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Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-1024

FURNESS WITHY & CO., LTD., in personam,
and
M/V FURNESS BRIDGE, her engines, tackle,
apparel, etc., in rem,

Petitioners

versus

BUNGE CORPORATION,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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and
M/V FURNESS BRIDGE, her engines, tackle,
apparel, etc., in rem.

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IN THE
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OCTOBER TERM, 1977

NO.

FURNESS WITHY & CO., LTD., in personam,
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versus

BUNGE CORPORATION,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, Furness Withy & Co., Ltd., in personam, and M/V FURNESS BRIDGE, her engines, tackle, apparel, etc., in rem, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on September 2, 1977, rehearing denied October 20, 1977.

OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals in this case is reported at 558 F.2d 790 (5th Cir. 1977), and is set forth at Appendix "B" hereto.

The order of the Fifth Circuit Court of Appeals denying rehearing was dated October 20, 1977 and is reported at 564 F.2d 97 (5th Cir. 1977), and is set forth at Appendix "D" hereto.

The decision by the United States District Court for the Eastern District of Louisiana in this case is reported at 396 F.Supp. 852 (E.D. La. 1975), and is set forth at Appendix "A" hereto.

JURISDICTION

The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254(1) pursuant to the September 2, 1977 opinion of the Fifth Circuit Court of Appeals reversing the May 23, 1975 judgment of the United States District Court for the Eastern District of Louisiana holding both petitioner and respondent equally at fault for the damages complained and pursuant to the October 20, 1977 denial of rehearing by the Fifth Circuit Court of Appeals.

QUESTIONS PRESENTED

I.

Are *Reliable Transfer, Smith v. Burnett* and other decisions of this Court violated by the Fifth Circuit Court of Appeals' holding in this case and is there a conflict in the circuits as to the following questions:

1 - Does a vessel's master have a duty to examine a facility prior to berthing there when a wharf owner-charterer-shipper orders the vessels in at night?

2 - Should an open and obvious condition (possibly noticeable in daylight) of a wharf impose absolute liability on the part of a vessel when the vessel is ordered into berth at night by a wharf owner-charterer shipper?

3 - Should a wharf owner-charterer-shipper be charged with at least some negligence when it orders a vessel to move at night into a berth which it knows is inadequate and too small for the vessel?

4 - Does a wharf owner-charterer-shipper have a duty of taking superprecautions when they invite a supertanker to berth at their facility which was designed for lesser vessels?

5 - May an appellate court reverse a trial court's findings on percentage distribution of liability when the appellate court does not find any of the facts found by the trial court to be clearly erroneous?

6 - Should there be a greater duty on a wharf owner who is also a charterer and shipper to warn of conditions at his facility which affect docking when there is a safe berth clause in the Charter Party?

II.

Has the Fifth Circuit Court of Appeals' decision involving the safe berth clause of the charter parties violated the holdings of this Court and the Court of Appeals for the Second Circuit as to the following questions:

1 - Is a safe berth clause in a Charter Party a "boilerplate provision" with no meaning as found by the Fifth Circuit Court of Appeals or does it have any meaning and if so, what interpretations should be adopted by admiralty courts in the United States?

2 - Does a safe berth clause create a breach of the charter party on the part of a charterer-wharf

owner who invites a vessel into its berth when that berth is inadequate for the vessel?

3 - Does a safe berth clause imply a contractual duty on the charterer-wharf owner to provide a completely safe berth for the vessel which the charterer-wharf owner invites into its facility?

4 - Does negligence of a master result in divided damages or has *Reliable Transfer* also changed this to a proportionate fault concept?

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

Article III, Section 2 of the Constitution of the United States reads in pertinent part as follows:

> "Section 2: The judicial power shall extend... to all cases of admiralty and maritime jurisdiction..."

46 U.S.C. 740 provides in pertinent part as follows:

> " § 740. Extension of admiralty and maritime jurisdiction; libel in rem or in personam; exclusive remedy; waiting period
>
> The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land."

STATEMENT OF THE CASE

On the night of January 15, 1974, the M/V FURNESS BRIDGE, the then longest vessel to enter the Mississippi River, berthed at the Bunge Wharf on the Mississippi River. During the berthing process, the vessel nudged a mooring dolphin, sustaining a score mark a few feet long but causing an alleged $100,000.00 in damages to the dolphin. The facts of this case were stated by the District Court and accepted by the Court of Appeals:

The district court has concisely set out the facts of this case:

> Bunge owns and operates a grain elevator and dock. The dock consists of a steel piled wharf with five mooring dolphins, two located upstream of the wharf and three located downstream of the wharf. The total distance between the dolphins is 820 feet. The dolphins are recessed about 2 feet from a line that would run along the face of the wharf, do not serve as breasting dolphins, and do not have fenders. There should be no contact between them and a ship entering or leaving the dock. The positions of the mooring dolphins as well as the fact that they do not have fenders is obvious, at least in day light, as they are in plain view.
>
> Bunge's wharf has an area capable of withstanding breasting forces 470 foot long. If the dolphins were capable of withstanding a breasting force, they would add to the frontage against which a vessel might breast; but, as they stand, they do not. In addition, since their maximum span is 820 feet, they afford no facility for putting out lines fore and aft of the vessel itself.
>
> The wharf was designed only to accommodate vessels under a displacement tonnage of 33,750 tons, mooring at

a velocity of ¼ of a foot per second (less than one mile per hour), and approaching the wharf at an angle of 10 degrees or less. By contrast, the Furness Bridge displaced 112,000 tons.

The Furness Bridge is more than twice as long as the wharf; its length and bulk make great care necessary in berthing it, for the unprotected dolphins are not designed to take-breasting forces. Elementary geometry demonstrates that a vessel twice the length of the wharf may strike one of the dolphins if it approaches at an angle of 3 degrees, while a 400 foot vessel would have to approach at a greater angle or miss the wharf completely before striking the dolphin.

The Furness Bridge was under the exclusive custody and control of employees of Furness Withy; it was operating under a time charter to Seabridge, who voyage subchartered to Bunge. Both charters contained "safe berth" clauses but the Bunge-Seabridge charter did not incorporate the Furness Withy-Seabridge charter nor did Bunge make any independent stipulations in favor of Furness Withy.

During the daylight hours of January 15, 1974, the Furness Bridge was lying upriver from the Bunge dock. Toward the end of the day, Bunge ordered the vessel into berth that night. The master objected and asked that he be permitted to wait until morning. Bunge replied that, if the vessel was not ready to berth at night, it would be taken off hire until it proceeded.[1] The master then undertook to attempt a berth.

1. The record is not clear on this point. See slip 558 F.2d at 799-800, *infra*.

What happened during the berthing is much disputed but I am persuaded that a preponderance of the credible evidence indicates that Bunge gave only the rudimentary instruction about berthing procedures; it informed the vessel that the custom was to drop both anchors upriver of the berth, then drop back and dock alongside. The owner's agent sought no instructions as to whether three or four tugs were needed; having docked at New Orleans with three, having no warning that this number would be insufficient, he ordered three. Hindsight demonstrates that using four would have been much safer.

The Furness Bridge was navigated stern first downriver, using the current, and maneuvered in crab-fashion towards the dock, using lines and cables. When it was about fifty feet off the dock it began to move into the berth. A line was put ashore from the bow to the upstream dolphin. A few minutes later the aft line was put ashore. As the vessel moved in the river the fog increased, obscuring visibility at the river level, although the lights atop the docking facility were clear. The vessel was moving forward and upriver toward the dock, at an angle of less than 5°, when the starboard side of the bow struck the upriver dolphin. At the time the vessel was moving at a slow speed, using considerable caution.

The vessel thereafter completed berthing and was moored alongside fore and aft at 0025 hours on January 16, 1974. However, she had to keep one tug in attendance at all times to keep her bow next to the wharf. In spite of these efforts, she broke away from the wharf at approximately 2020 on January 16. During the time the vessel was alongside, she pulled 4 bollards or cleats off

the Bunge facility.

The M/V Furness Bridge redocked a day later in daylight using 4 tugs.[2] This time the docking was without incident. 396 F. Supp. at 854-55. [558 F.2d at 793-94.]

A summary or itemization of the more pertinent facts of this are:

1 - Respondent as Wharfinger knew or should have known the exact dimensions, limitations and characteristics of its wharf;

2 - Respondent as Whafinger knew or should have known the river current and effect of darkness and/or fog on berthing vessels at its wharf;

3 - Respondent, as Sub-Charterer of the vessel and shipper of cargo on the vessel, knew or should have known the exact size of the vessel;

4 - The vessel's berthing was, to all intents and purposes, completely normal:

a. The vessel came in to the wharf at an angle of less than 5 degrees (the wharf was designed to allow berthing at an angle of 10 degrees or less, this applied however to vessels considerably smaller than the M/V FURNESS BRIDGE).

2. The vessel in fact redocked the following night, in darkness. Both parties concede that the district court is in error on this point.

b. The vessel berthed at a slow speed.

c. The vessel berthed using considerable caution.

5 - No warning of the wharf's limitations or dimensaions was given, despite the fact that respondent ordered the vessel into berth at night and only gave certain "rudimentary" instructions on berthing procedures at its wharf.

6 - The wharf was inadequate for a vessel the size of the M/V FURNESS BRIDGE, being 470 feet long and designed for a vessel displacing a maximum of 33,750 tons.

7 - The M/V FURNESS BRIDGE was 925 feet long and displaced 112,000 tons.

8 - The mooring dolphins were recessed only two (2) feet behind a line along the face of the wharf with a total of eight hundred twenty (820') feet from the extreme upstream dolphin to the extreme downstream dolphin.

9 - Elementary geometry demonstrates that the 925-foot long vessel will strike either the mooring dolphin upstream or downstream if it approaches the 470-foot long wharf at an angle of 3 degrees or more.

10 - At night, the condition of the mooring dolphin would not be obvious to the master of a vessel berthing at a wharf, nor to a lookout on a vessel's bow, as darkness would hide the true condition of the dolphin from the vessel.

Suit was filed by Bunge Corporation in June, 1974.

After a trial on the merits, Judge Alvin B. Rubin of the United States District Court for the Eastern District of Louisiana rendered an opinion holding both respondent and petitioner equally at fault for the damage caused to the Bunge mooring dolphin. In pertinent part the District Court found that Bunge, as Wharfinger, failed to use due care under the circumstances. In particular, Bunge, as Wharfinger, Sub-Charterer of the vessel and shipper, knew the precise characteristics of the vessel (including her tonnage, length, breadth and draft), the current in the river at its wharf, the layers of river fog, the visibility problems encountered in docking at night, the exact limitations of its wharf and the exact dimensions of its wharf in relation to the mooring dolphin and to the size of the vessel. Bunge gave the master of the vessel very rudimentary instructions in how to berth at its wharf but failed to warn the master of the danger his vessel would present to the mooring dolphin during a normal docking. The vessel was held at fault for berthing at night, using three tugs where four would have been better and approaching at an angle that did cause the bow of the vessel to strike the dolphin. No actual act of negligence in the berthing of the vessel was found. In fact the District Court specifically found that the vessel came in to the wharf at an angle of less than five (5°) degrees, at a slow speed using considerable caution.

An appeal was had to the United States Court of Appeals for the Fifth Circuit by both petitioner and respondent and by an opinion rendered on September 2, 1977 the judgment of the District Court imposing mutual fault was reversed on the basis that the District Court had applied an improper standard of care to respondent. The Court of Appeals held that the Wharfinger had no obligation to warn the vessel about the size and structure of its wharf, that the Wharfinger had no duty to warn the vessel of hazards to the unprotected dolphins located near the wharf, that the vessel's master had exclusive responsibility for deciding on the number of tugs to be used in docking, that the Wharfinger could not be held negligent in ordering the vessel to dock at night in the presence of fog and that the wharf owner could not be held liable under the safe berth clause of the Charter Party. Petitioner timely filed a request for rehearing and a request for rehearing en banc which was denied by the Fifth Circuit Court of Appeals on October 20, 1977. This petition for writ of certiorari follows.

REASONS FOR GRANT OF THE WRIT

The decision of the majority of the panel in this case raises compelling reasons which require the grant of the writ requested.

I. THE FIFTH CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT IF A CONDITION IS OPEN AND OBVIOUS THIS IMPOSES ABSOLUTE AND SOLE LIABILITY ON THE VESSEL OWNER REGARDLESS OF ANY FAULT OR FAILURE TO USE DUE CARE BY THE WHARF OWNER, WHICH HOLDING IS IN CONFLICT WITH *SMITH V. BURNETT* AND *UNITED STATES V. RELIABLE TRANSFER CO.*, AND IS IN CONFLICT WITH DECISION OF THE COURTS OF APPEAL FOR THE SECOND, FOURTH, SEVENTH AND NINTH CIRCUITS AND FOR THIS REASON CERTIORARI SHOULD BE GRANTED.

II. THE OPINION OF THE PANEL FAILED TO CONSIDER FAULT ON THE PART OF THE WHARFINGER, WHICH FAULT WAS SUPPORTED BY THE TRIAL

TESTIMONY: AND THEREFORE, THE DECISION IS IN VIOLATION OF THE *RELIABLE TRANSFER* RULE.

III. THE COURT OF APPEALS' REVERSAL OF THE DISTRICT COURT'S FINDINGS OF NEGLIGENCE BY RESPONDENT AND PERCENTAGES OF FAULT VIOLATED THE CLEARLY ERRONEOUS RULE OF FEDERAL RULE OF CIVIL PROCEDURE RULE 52(a) AND IS IN CONFLICT WITH ESTABLISHED ADMIRALTY PRECEDENTS IN OTHER JURISDICTIONS.

IV. THE COURT OF APPEALS ERRONEOUSLY CONSTRUED THE SAFE BERTH OBLIGATION OF RESPONDENT AS BEING ONLY BOILERPLATE AND APPLIED A RULE IN CONFLICT WITH PREVIOUS DECISION OF THIS HONORABLE COURT IN *THE GAZELLE* AND *MENCKE V. A CARGO OF JAVA SUGAR* AND DECISIONS OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT.

ARGUMENT

I.

THE FIFTH CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT IF A CONDITION IS OPEN AND OBVIOUS THIS IMPOSES ABSOLUTE AND SOLE LIABILITY ON THE VESSEL OWNER REGARDLESS OF ANY FAULT OR FAILURE TO USE DUE CARE BY THE WHARF OWNER, WHICH HOLDING IS IN CONFLICT WITH SMITH V. BURNETT AND UNITED STATES V. RELIABLE TRANSFER CO., AND IS IN CONFLICT WITH DECISIONS OF THE COURTS OF APPEAL FOR THE SECOND, FOURTH, SEVENTH AND NINTH CIRCUITS AND FOR THIS REASON CERTIORARI SHOULD BE GRANTED.

This Court has not examined the specific question of safe berth-wharfinger's duty since *Smith v. Burnett*, 173 U.S. 430 (1899). In that case, which involved a different factual situation from the case at hand, a shipowner sued for damages to his cargo schooner caused by a submerged rock which the wharfinger had negligently allowed to remain in the bed of the river within the limits of the berth underwater. The master of the vessel had no knowledge of the underwater obstruction. The Court, in holding for the vessel owner, set forth the following principle:

> "Although a wharfinger does not guarantee the safety of vessels coming to his wharves, *he is bound to exercise reasonable diligence in ascertaining the condition of the berths thereat*, and if there is any dangerous obstruction, to remove it, or to give due notice of its existence to vessels about to use the berths. At the same time the *master is bound to use ordinary care, and cannot carelessly run into danger.*" 173 U.S. at 433. (Emphasis supplied)

Although this holding should perhaps be narrowly construed as applicable only to situations involving completely hidden obstructions, the general standards of care on the part of both wharfinger and master are valid and highly pertinent to the case at hand.

In spite of the fact that *Smith* was a decision of another time and age which involved a relatively small sailing vessel, there are several highly interesting parallels between it and *Bunge Corporation v. M/V FURNESS BRIDGE*, 396 F. Supp. 852 (E.D. La. 1975), *rev'd* 558 F.2d 790 (5th Cir. 1977): the master of the schooner "came to the berth on

appellant's business..." 173 U.S. at 438. Additionally, the master of the vessel in *Smith* did not personally inspect the wharf prior to docking and this Court remarked:

> "...We cannot say as a matter of law, that he (the master) was negligent because he did not examine or measure the dock and berth." 173 U.S. at 434.

No mention is made of *Smith v. Burnett* in the opinion of the Fifth Circuit Court of Appeals. However, in setting forth "the applicable standard of care" the Fifth Circuit purports to state the "prevailing view" as follows:

> "It is well settled that a wharfinger is not the guarantor of the safety of a ship coming to his wharf. He is, however, under a duty to exercise reasonable diligence to furnish a safe berth and to avoid damage to the vessel. This includes the duty to ascertain the condition of the berth, to make it safe or warn the ship of any hidden hazard or deficiency known to the wharfinger or which, in the exercise of reasonable care and inspection, should be known to him and not reasonably known to the shipowner." 558 F.2d at 795.

This "authority" is a verbatim quote from the Fifth Circuit's own *Trade Banner Line Inc. v. Caribbean Steamship Co. S.A.*, 521 F.2d 229, 230 (5th Cir. 1975) which involved a vessel coming adrift from a dock because her lines either parted or slipped loose, and is therefore, completely distinguishable from the instant case. Continuing their reliance on *Trade Banner Line* and even lesser authority, the Circuit Court continues to define "the wharfinger's duty":

> "The wharfinger's duty to warn applies only to 'any hidden hazard or deficiency...not reasonably known to the shipowner.' Id. Thus, no warning is required 'where the alleged obstruction or condition is open and obvious to those in charge of the vessel's management' or where those in control of the vessel have actual knowledge. *General Construction Co. v. Isthmian Lines, Inc.*, 259 F. Supp. 336, 339 (D. Or. 1966). See also *Sabine Towing and Transportation Co. v. St. Joe Paper Co.*, 297 F.Supp. 748 (N.D. Fla. 1968)." 558 F. 2d at 795.

It is indeed interesting to trace the origin of the above quoted "wharfinger's duty". Although the *Trade Banner Line* opinion cites *Smith v. Burnett, Grace Line Inc. v. Todd Shipyards Corp.*, 500 F.2d 361, 365 (9th Cir. 1974), and *Medomsley Steam Shipping Co. v. Elizabeth River Terminals*, 354 F.2d 476, 480 (4th Cir. 1966) in support of their position, the "duty" as quoted is for the most part the creation of the Fifth Circuit since the language used changes the meaning of the *Smith* case and cannot be found in either *Grace Line* or *Medomsley*. Finally, the Fifth Circuit states that no warning is required " 'where the alleged obstruction or condition is open and obvious to those in charge of the vessel's management' or where those in control of the vessel have actual knowledge." 558 F.2d at 795, citing *General Construction Co. v. Isthmian Lines*, 259 F. Supp. 336, 339 (D. Or. 1966); and *Sabine Towing and Transportation Co. v. St. Joe Paper Co.*, 297 F.Supp. 748 (N.D. Fla. 1968). These two district court cases can hardly be classified as eminent authority since they are completely different factually and do not involve supertankers berthing at inadequate docks. Significantly, the *General Construc-*

tion case is the first case to specifically set forth the "open and obvious" test:

> "The general concept of a formal notice *which seemed to originate in Smith v. Burnett*...is not applied where the alleged upstruction or condition is *open and obvious* to those in charge of the vessel's management. Here, the absence of constructive notice, must give way to the finding of actual knowledge." 259 F. Supp. at 338-39 (Emphasis supplied.)

The *General Construction* case involving damage to a pile fender corner noticeably under construction, which vessel personnel were actually aware of, was relied upon by the district court in *Sabine Towing*. *General Construction*, which suggests that "open and obvious" conditions will exonerate a wharfinger completely, arose nine years before the advent of *Reliable Transfer*. Despite the compelling mandate of *Reliable Transfer* that fault should be apportioned, the Fifth Circuit chooses to ignore *Reliable Transfer* and create illicit progeny through the case at bar.

It is indeed difficult to comprehend the logic of the Fifth Circuit opinion in light of the modern era of large supertankers and small, inadequate docks that invite such vessels. The Circuit Court, in its "Application of the Relevant Standard", 558 F.2d at 796, intimates that an open and obvious condition existed, and therefore "we conclude that the rule regarding hidden damages did not come into play." *Id.* It is quite clear from the record and trial court's findings that the dock was inadequate for the vessel (and similar sized vessels) and that the master was not fully aware of the dangers since he had never before been to that

dock, nor was he even aware that the vessel was to visit that dock until his arrival in the New Orleans area, since the charter party did not mention the dock either by name or characteristics.

The damage in this case arose because of the design of the wharf in relation to a vessel the size of the M/V FURNESS BRIDGE. The disparity in sizes, together with the location of the dolphin almost even with the face of the dock (set back two feet) made contact between a vessel and the dolphin inevitable if the vessel approached the berth at any angle over three (3°) degrees, although the berth was designed so that vessels could berth at an angle of ten (10°) degrees. Significantly, the Circuit Court seemingly contradicts itself by stating:

> "If a mariner cannot fully perceive hazards even though the physical objects creating them are in plain sight, then the duty to warn attaches." Id.

There was every reason, well supported by the evidence, for the Circuit Court to follow this rationale, yet they failed to do so! In a very recent case involving damage to a dock where the wharf's condition could not be fully perceived by vessel personnel, the United States District Court for the Eastern District of Louisiana divided the damages equally between wharfinger and vessel since not all of the danger was obvious, and noted "the dangers existing at the Public Grain Elevator were for the most part concealed". *Board of Commissioners of the Port of New Orleans v. M/V GIBRALTAR PANSY*, 1977 A.M.C. 878, 885 (E.D. La. 1977). Therefore, in post-*Reliable Transfer* allision cases, if there is a "gray area" between "obvious" and "hidden", a trial court is fully justified apportioning fault accordingly,

which prevents manifest injustice.

No other Circuit Court has seen fit to actively adopt the fallacious and unrealistic "open and obvious vs. hidden" test as dispositive of vessel - wharf liabilities, either before or after the *Reliable Transfer* decision. See e.g. *Berwind - White v. City of New York*, 1941 A.M.C. 1142 (1941), *aff'd*, 135 F.2d 443 (2d Cir. 1943); *Medomsley Steam Shipping Co. v. Elizabeth River Terminals*, 354 F.2d 476 (4th Cir. 1966); *White Stack Towing Corp. v. Hewitt Oil Co.*, 216 F.2d 776 (4th Cir. 1954); *Venore Transp. Co. v. Oswego Shipping Corp.*, 498 F.2d 469 (2d Cir. 1974); *Schwerman Trucking Company v. Gartland S.S. Co.*, 496 F. 2d 466 (7th Cir. 1974).

Additionally, the circuit opinion emphasizes that the compulsory pilot of the M/V FURNESS BRIDGE had docked ships at the Bunge facility on prior occasions. 558 F.2d at 797. A berth or port must be safe for a *particular vessel.* Pilot Watson had never taken the M/V FURNESS BRIDGE into Bunge before, and indeed, had never before been aboard the vessel. In a case with facts less favorable to the vessel than the instant case, where the pilot had knowledge of prior accidents caused by a drydock's hidden condition, the Ninth Circuit noted that the pilot's "knowledge of a prior dangerous condition does not necessarily establish his actual awareness at the time of his collision." *Grace Line Inc. v. Todd Shipyards Corp.*, 500 F.2d at 365. Other courts have also wisely and correctly refused to fault a vessel and her owners in allision cases where the compulsory pilot had previously visited the facility. See *Venore Transp. Co. v. Oswego Shipping Corp.*, 498 F.2d 469 (2d Cir. 1974); *White Stack Towing Corp. v. Hewitt Oil Co.*, 216 F.2d 776 (4th Cir. 1954); *Board of Commissioners of*

the Port of New Orleans v. M/V GIBRALTAR PANSY, 1977 A.M.C. 878 (E.D.La. 1977); *Georgia Ports Authority v. L/S BILDERDYK* 402 F.Supp. 706 (S.D. Ga. 1975).

It is quite clear from the trial court's findings and related testimony that the master and pilot of the M/V FURNESS BRIDGE used more than ordinary care, which exceeds the requirements of *Smith v. Burnett.* Although the shipowner is not responsible *in personam* for the negligence of a compulsory pilot, *Homer Ramsdell Transport Co. v. Compagnie Generale Transatlantique*, 182 U.S. 406 (1901); compulsory pilotage is not a defense to a suit *in rem. The China*, 74 U.S. (7 Wall.) 53 (1869). We submit that no negligence was shown on the part of the pilot of the M/V FURNESS BRIDGE, and certainly, no negligence should be imputed merely because of his prior visits to the Bunge wharf on smaller vessels. The leading American authority on the law of collision, Griffin, is clearly of the opinion that the master should not be held responsible for a pilot's acts when the master relies on a pilot who has not taken an obvious risk:

> A master should be entitled to rely on the pilot unless the pilot is clearly going wrong. Every difference of opinion or judgment should not require the master to overrule the pilot; that would result in dangerous two-headed navigation. It is submitted that fault should not be imputed to the master unless he has acquiesced in orders involving obvious risks. J.W. Griffin, *The American Law of Collision* 449 (1949).

Finally, it should be emphasized that under the rule of *Smith v. Burnett*, neither the master nor the pilot would

be required to go out and "examine or measure" the dock. 173 U.S. at 434. Additionally, at least one Court of Appeals has found a wharfinger liable even where signs were placed on a dock indicating the wharf was unsafe, yet the wharfinger continued to allow vessels to moor there. *Berwind - White v. City of New York*, 135 F.2d 443 (2d Cir. 1943). The master of the M/V FURNESS BRIDGE had no such notice of unsafe conditions, which could not be fully perceived by anyone without resort to a scale diagram of respondent's wharf.

Even in the days of sail, the charterer was chargeable with knowledge of the tonnage and draft of the vessel and of the state of the harbor, *Belmont v. Tyson*, 3 F.Cas. 150 (S.D. N.Y. 1856) (No. 1,281). In the case at bar, Francis Callanan, Gulf Marine Manager of Bunge Corporation, in charge of the dock in question, was aware of the size and capacity of the M/V FURNESS BRIDGE (Fifth Circuit Record, p. 243); but was not even aware of the exact dimensions of the dock (Fifth Circuit Record, p. 670) or whether or not the dolphin was designed to take a breasting force! (See Fifth Circuit Record, p. 672).

It is submitted that the decision at bar is a judicial anomaly and a marked deviation from the American law of allision, especially in view of the *Reliable Transfer* decision. The "open and obvious" versus "hidden" test for liability is of doubtful utility in determination of liability in situations such as the instant one. The relationship between vessel owner and wharfinger here cannot be determined so simplistically. It is also highly artificial to charge a ship's captain and compulsory pilot with the knowledge of a civil engineer or naval architect.

It should be also emphasized that a wharfinger is not entitled to a perfect docking, but only a normal one, and here, that Judge Rubin (now a member of the Fifth Circuit) a District Court judge with extensive experience in collision cases, specifically found that the vessel 1) approached at an angle of less than five (5°) degrees, 2) moved at a slow speed and 3) used considerable caution. Surely the M/V FURNESS BRIDGE made a normal landing under the existing circumstances, since more than ordinary care was used. Other courts have recognized that it is humanly impossible for a vessel to make a four-point landing. See *White Stack Towing Corp. v. Hewitt Oil Co.*, 216 F.2d 776 (4th Cir. 1954); and *Georgia Ports Authority v. L/S BILDERDYK*, 402 F.Supp. 706 (S.D. Ga. 1975).

In this case, the dolphin itself could be easily seen; however, as this dolphin was located virtually in line with the wharf, it appeared to be an extension of the wharf and even though the M/V FURNESS BRIDGE was coming in at an angle less than five(5°) degrees, she had to come into contact with it because of the geometric principle involved. This is not something which lends itself to a blanket statement that dock owners are not responsible for only open and obvious defects. If this be the rule, then prior to docking, every vessel will have to know the exact dimensions and strength of a wharf, as the Fifth Circuit places this burden upon the vessel. A vessel, we submit, should be able to dock in a usual or normal manner unless she is forewarned that the dock is insufficient for the vessel and the vessel then still chooses to come into the berth. Here, the M/V FURNESS BRIDGE could not be expected to know that she had to make a perfect four-point landing or docking or she would cause damage to the facility.

This Court should carefully examine this case in view of the rule of *Smith v. Burnett*, and especially in light of *Reliable Transfer* and the special conditions existing today in an age of large ships and small, inadequate docks, since supertankers require super precautions. *See generally*, Ringdal, *Some Liability Aspects of Navigation and Berthing of Very Large Tankers* (Appendix F, A-51).

The opinion of the Fifth Circuit Court of Appeals in the case at hand suggests that where a wharf, dock, or port condition is "open and obvious" to vessel personnel, then fault could never be apportioned and a wharfinger or port authority could never be found liable. This position is untenable since it is in direct contravention of both the letter and spirit of *United States v. Reliable Transfer Company*, 421 U. S. 497 (1975). Significantly, the facts of *Reliable Transfer* indicate that in spite of the fact that the master of the *MARY A. WHALEN* noticed that the breakwater light was out, an "open and obvious" condition if there ever was one, he nevertheless proceeded and the vessel ran aground. The trial court held that fault was on the basis of seventy-five (75%) percent (vessel) and twenty-five (25%) percent (light owner) (although liability was divided 50%-50%), *Reliable Transfer v. United States*, 1972 A.M.C. 1757 (S.D. N.Y. 1972). This Court affirmed the trial court's apportionment of fault. We submit that on this basis alone, the holding of the Fifth Circuit is improper.

II.

THE OPINION OF THE PANEL FAILED TO CONSIDER FAULT ON THE PART OF THE WHARFINGER, WHICH FAULT WAS SUPPORTED BY THE TRIAL TESTIMONY: AND THEREFORE, THE DECISION IS IN VIOLATION OF THE RELIABLE TRANSFER RULE.

The *Reliable Transfer* decision was a mandate to triers of fact to determine the amount of fault on the part of various interests in suit, rather than to apply by rote the rule of law of mutual fault which had no appreciation for the relative degree of fault of the parties involved. Courts cannot now absolve the dock owner when credible evidence dictates his fault, for the *Reliable Transfer* decision requires that there be an apportionment of damages between owners of ships and stationary objects based upon fault. Significantly, the *Reliable Transfer* decision itself rejects devices such as the major-minor fault doctrine which would undercut the proportionate fault concept:

> "But this escape valve (the major-minor fault doctrine), in addition to being inherently unreliable, simply replaces one unfairness with another. That a vessel is primarily negligent does not justify its shouldering all responsibility, nor excuse the slightly negligent vessel from bearing any liability at all." *United States v. Reliable Transfer Co.*, 421 U.S. 397, 406 (1975).

A recent attempt to subvert *Reliable Transfer* was strongly repudiated by the Second Circuit in *Getty Oil Co. (Eastern Operations), Inc. v. S.S. PONCE DE LEON*, 555 F.2d 328 (2d Cir. 1977):

> "We can only conclude that the *Reliable* stands for the proposition that in cases such as this, the district court is obliged to apportion the damages even if one vessel is primarily responsible for the loss and the other is only slightly negligent." 555 F.2d at 333.

We emphasize there was ample evidence before the trial court to justify its finding that Bunge was negligent.

The *Reliable* rule of apportionment of fault is not restricted to collisions between vessels, but is also applicable to collisions between vessels and fixed objects as well as non-collision apportionment of fault. In *California v. M/S ILICE*, 534 F.2d 836 (9th Cir. 1976), a ship hit a bridge, but the bridge tender failed to ring a bell; the Ninth Circuit found the bridge fifty (50%) percent at fault. In *Feeder Line Towing Service, Inc. v. Toledo, Peoria & Western Railroad Co.*, 539 F.2d 1107 (7th Cir. 1976), a vessel hit an unmarked, unlighted obstruction causing damage to the vessel, and the bridge was found sixty-five (65%) percent at fault. In *Crown Zellerbach Corp. v. Willamette-Western Corp.*, 519 F.2d 1327 (9th Cir. 1975), a boom on a barge struck a power line standing below its authorized height, and the court found the power line twenty (20%) percent at fault. In *Alter Co. v. United States*, 412 F.Supp. 73 (S.D. Iowa 1976), a vessel struck a lock causing damage to the vessel, and the court found the lock ten (10%) percent at fault where the lock operator stood mute in the face of a navigational maneuver known to be dangerous. In *S.C. Loveland, Inc. v. East-West Towing, Inc.*, 415 F. Supp. 596 (S.D. Fla. 1976), a drifting barge damaged a bridge, and the court found the bridge twenty-five (25%) percent at fault for not calling parties to assist the barge as it came drifting into the bridge.

The rule that a moving vessel is presumed at fault unless she overcomes this presumption by evidence that she was not at fault is still in effect. However, if the moving vessel shows that the dock owner has some fault or that its facility

is insufficient for the vessel docking, then *Reliable*'s proportionate fault rule is clearly applicable. This thereby reduces the harsh rule of mutual fault and sole fault. The rule in *The PENNSYLVANIA*, 86 U.S. (19 Wall). 125 (1874), held that a vessel in violation of a statute intended to prevent collisions had to overcome a presumption of negligence by showing not only that the fault shown probably did not, but also could not have contributed to causing the collision. Reams of paper have been written concerning whether the rule of *The PENNSYLVANIA* raises a presumption or whether it is merely a rule of the burden of proof. The important consideration of the rule in *The PENNSYLVANIA* to the subject case is the fact that the rule of *The PENNSYLVANIA* created harsh results and allowed courts to overlook negligence on the part of one party where the other party was in violation of a statute. *Reliable Transfer* did not do away with this rule, but has certainly diminished its harsh results. *See The Yorkmar*, 1977 A.M.C. 805, 829 (D. Md. 1977). Predictably, even in post-*Reliable Transfer* cases where statutory fault was at issue, courts did not apply *The PENNSYLVANIA* rule to the exclusion of finding no fault by vessels which did not violate a statute. Thus, in *Reliable Transfer*, the court found the vessel seventy-five (75%) percent at fault. In *Guidry v. LeBoeuf Brothers Towing Co.*, 398 F.Supp. 952 (E.D. La. 1975), an overtaking tug was found to be sixty-five (65%) percent at fault. In *Alamo Chemical Transp. Co. v. M/V OVERSEAS VALDES*, 398 F.Supp 1094 (E. D. La. 1975), the court found one vessel twenty (20%) percent at fault. In *Fathom Expeditions, Inc. v. M/T GAURION*, 402 F.Supp. 390 (M.D Fla. 1975), a vessel was found forty (40%) percent at fault. In *Getty Oil Co. (Eastern Operations), Inc. v. S.S. PONCE DE LEON, supra*, an anchored vessel was found twenty

(20%) percent at fault. In *Linehan v. United States Lines,* 417 F.Supp. 678 (D. Del. 1976), a yacht violating the Narrow Channel Rule was found twenty (20%) percent at fault. In *Barge Poling Bros. No. 23, Inc. v. Namset,* 429 F. Supp. 1315 (S.D. N.Y. 1977), an ocean vessel failing to give proper sound signals was found twenty (20%) percent at fault.

Finally, it should be noted that since the *Reliable Transfer* decision at least two trial courts in the Fifth Circuit have recently found fault on the part of inadequate docks that have invited large, modern vessels to berth. In *Board of Commissioners of the Port of New Orleans v. M/V GIBRALTAR PANSY,* 1977 A.M.C. 878 (E.D. La. 1977), the district court found the dock fifty (50%) percent at fault for failure to provide the vessel (which was 856 feet in length and displaced 68,000 gross tons) with a safe and adequate wharf and failure to give notice of its deficiencies. Also, in *Georgia Ports Authority v. L/S BILDERDYK,* 402 F.Supp. 706 (S.D. Ga. 1975) the district court dismissed plaintiff dockowners' complaint against owners of the LASH Ship BILDERDYK, a vessel 857 feet in length, displacing 58,000 tons loaded, recognizing that a wharfinger is not entitled to a perfect berthing but only a normal one. Logically and rationally, the courts in the two aforementioned cases did not require the masters and pilots of the GIBRALTAR PANSY and BILDERDYK to be marine structural engineers, and made no reference to the highly questionable "open and obvious" rule. Both the GIBRALTAR PANSY and BILDERDYK were smaller vessels than the M/V FURNESS BRIDGE.

Since both the trial court and the appellate court found

that the dock was inadequate, under the mandate of *Reliable Transfer,* some percentage of fault has to be assessed against the wharfowner.

III.

THE COURT OF APPEALS' REVERSAL OF THE DISTRICT COURT'S FINDINGS OF NEGLIGENCE BY RESPONDENT AND PERCENTAGES OF FAULT VIOLATED THE CLEARLY ERRONEOUS RULE OF FEDERAL RULE OF CIVIL PROCEDURE RULE 52(a) AND IS IN CONFLICT WITH ESTABLISHED ADMIRALTY PRECEDENTS IN OTHER JURISDICTIONS.

Rule 52(a) reads in pertinent part:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

In this case the District Court heard the testimony of the witnesses and concluded that respondent failed to use due care under the circumstances of this case and proportioned liability on a 50-50 basis. 396 F.Supp. at 858. The Court of Appeals reversed both factual findings substituting its judgment for that of the District Court without any reference to the clearly erroneous rule of Rule 52(a), 558 F.2d 790.

The standard of review of a Trial Court's findings have been simply stated by this Court in *Zenith Radio Corp. v. Hazeltine Research,* 395 U.S. 100, 123 (1969):

> "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo."

United States v. National Association of Real Estate Boards, 339 U.S. 485, 495-96 (1950):

> "It is not enough that we might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent. *See United States v. Yellow Cab Co.*, 338 U.S. 338, 342, and 150, 153; *United States v. United States Gypsum Co.*, 333 U.S. 364, 394, 395. We are not given those choices, because our mandate is not to set aside findings of fact 'unless clearly erroneous.' "

United States v. Yellow Cab Co., 338 U.S. 338, 342 (1949):

> "While, of course, it would be our duty to correct clear error, even in findings of fact, the Government has failed to establish any greater grievance here than it might have in any case where the evidence would support a conclusion either way but where the trial court has decided it to weigh more heavily for the defendants. Such a choice between two permissible views of the weight of evidence is not 'clearly erroneous.' "

The clearly erroneous rule applies to admiralty cases in

general and to collision cases in particular. *Getty Oil Co. (Eastern Operations), Inc. v. S.S. PONCE DE LEON*, 555 F.2d 328, 333-34 (2d Cir. 1977); *Glenview Park District v. Melhus*, 540 F.2d 1321, 1323 (7th Cir. 1976); *Feeder Line Towing Service v. Toledo, Peoria & Western Railroad Company*, 539 F. 2d 1107, 1110 (7th Cir. 1976); *Termar Navigation Company v. S.S. POLANCIA*, 529 F.2d 1166, 1167 (5th Cir. 1976); *Harbor Towing Corp. v. S.S. CALMAR*, 507 F.2d 720 (4th Cir. 1974).

Significantly, until the decision of the Court of Appeals herein, the post-*Reliable Transfer* proportionate liability cases that reached the various Courts of Appeals resulted in affirmances of the percentage of liability found by the District Courts and review of such findings was under the clearly erroneous standard of Rule 52(a). *Getty Oil Co. (Eastern Operations), Inc. v. S.S. PONCE DE LEON*, 555 F.2d at 333-34; *Feeder Line Towing Service, Inc. v. Toledo, Peoria & Western Railroad Co.*, 539 F.2d at 1110; *Crown Zellerbach Corp. v. Willamette Western Corp.*, 519 F.2d 1327 (9th Cir. 1975). *See also California v. M/S ILICE*, 534 F. 2d 836 (9th Cir. 1976).

The proportionate fault rule has been in effect in the British Commonwealth, as well as in the world's other maritime countries, since adoption of the Brussels Collision Convention in 1910. The British position as to appellate review of apportionment has been explained by the House of Lords:

> "Apportionment is a question of degree of fault, depending on a trained and expert judgment considering all the circumstances, and it is different in essence from a mere finding of fact or law, but

of proportion, of balance and relative emphasis, and of weighing different considerations. It involves an individual choice or discretion, as to which there may well be differences of opinion by different minds. It is for that reason that an appellate court has been warned against interfering, save in very exceptional circumstances, with the judge's apportionment." *The McGregor*, [1943] A.C. 197, 201; 74 Lloyd's List L.R. 82, 85 (H.L. 1943).

More recently, the aforementioned principles were strongly reaffirmed by the House of Lords in *The Koningin Juliana*, [1973] 2 Lloyd's List L.R. 308 (Q.B. (Adm. Ct.)); [1974] 2 Lloyd's List L.R. 353 (C.A.); [1975] Lloyd's List L.R. 111 (H.L.); and *The Savina*, [1974] 2 Lloyd's List L.R. 317 (Q.B. (Adm. Ct.)); [1975] 2 Lloyd's List L.R. 141(C. A.);[1976] 2 Lloyd's List L.R. 123 (H.L.). The important role of the trial court in apportionment has also been recently discussed by the British Court of Appeal:

> "Apportionment of fault is not an easy task for any judge, but it must be said that the trial judge, who has the benefit of hearing the evidence at first hand and sensing the atmosphere of the case, enjoys an enormous advantage over any appellate tribunal." *The Koningin Juliana*, [1975] 2 Lloyd's List L.R. at 115.

The factual findings of the District Court of negligence by the respondent was premised on the very basic proposition that negligence is the failure to use due care under the circumstances. This proposition was stated in essence by Mr. Justice Holmes in *Oceanic Steam Nav. Co. v. Aitken (The GERMANIC)*, 196 U.S. 589, 596 (1905). The Court

of Appeals herein attempted to avoid the District Court's factual findings by the artifice of applying a different legal standard. The actions of respondent did not change, the knowledge of respondent did not change and the duty of respondent is dictated by the circumstances of this care. With full knowledge of the wharf's inadequacy, respondent invited a vessel, which it knew to be over twice as long as the wharf, to berth at night in a river, treacherous even at the best of times, without giving any warning of the inadequacies of the berth or physical limitations of the wharf.

Reliable Transfer requires apportionment of liability where two or more parties contribute by their fault to property damage. 421 U.S. at 411. The Fifth Circuit ignored the mandate of *Reliable Transfer* and violated the mandate of Rule 52(a) that "findings of fact shall not be set aside unless clearly erroneous."

IV.

THE COURT OF APPEALS ERRONEOUSLY CONSTRUED THE SAFE BERTH OBLIGATION OF RESPONDENT AS BEING ONLY BOILERPLATE AND APPLIED A RULE IN CONFLICT WITH PREVIOUS DECISIONS OF THIS HONORABLE COURT IN *THE GAZELLE* AND *MENCKE V. A CARGO OF JAVA SUGAR* AND DECISIONS OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT.

The M/V FURNESS BRIDGE was operating under two Charter Parties, a Time Charter by petitioner to Seabridge, and a Voyage Charter by Seabridge to respondent. Both Charter Parties contained safe berth clauses although the Voyage Charter did not make reference to the Time Charter.

The safe berth warranty by a voyage charterer runs in favor of the owner of a vessel when there is a breach of the warranty and the vessel suffers damage or claims against it. *See Constantine & Pickering SS Co. v. West India SS Co.*, 199 F. 964 (S.D. N.Y. 1912); *Paragon Oil Co. v. Republic Tankers, S.A.*, 310 F.2d 169 (2d Cir. 1962). *See also Director-General of R.R. vs. Dittmar (EDMONT)*, 1925 A. M. C. 549 (2d Cir. 1925).

The safe port warranty obliges the charterer or sub-charterer to supply the vessel with a safe berth within the port. *Mencke v. A Cargo of Java Sugar*, 187 U.S. 248 (1902); *Park S.S. Co. v. Cities Service Oil Co.*, 188 F.2d 804 (2d Cir.), *cert. denied* 342 U.S. 862 (1951); T. Carver, *Carriage by Sea*, 2 British Shipping Laws ¶ 543 at 453 (11th ed. R. Colinvaux 1963) *citing Lensen Shipping Co. v. Anglo-Soviets Shipping Co.*, (1935) 40 Com. Cas. 320.

In the first edition of their treatise on admiralty law, Messrs. Gilmore and Black discussed the distinction between a safe port and a safe berth, with a view to the different conditions under which shipowner/charterer disputes should be decided:

> The distinction between the 'safe ports' and 'safe berth--always afloat' clauses may be of importance in resolving the problem presented by the claim of the ship to be indemnified for physical damages sustained when she is ordered to a place that turns out to be unsafe. It seems perfectly clear that the master of the vessel, and not the charterer (who may have no nautical knowledge whatever) ought to bear the responsibility for keeping his vessel out of unsafe ports; to make

> the charterer the warrantor to the ship of the safety of ports to which he orders her would be senseless, and even to make him responsible on some fault basis in this regard would be to place responsibility where it does not belong. Where, on the other hand, a charterer designates a berth which is unsafe, and damage to the vessel ensues, it may be reasonable, in some circumstances, to make him liable, since the master need not be taken to have any special knowledge of local conditions of this sort, and the fact may be that the charterer had. Gilmore and Black, *The Law of Admiralty*, § 4-4 at 181 (1957).

In the second edition of their treatise, Messrs. Gilmore and Black take the view that the charterer should in general have little or no liability for nominating an unsafe port or berth. However special circumstances may change this proposed result in a given case:

> Special circumstances vary from case to case. It is possible, though most unlikely, that a charterer will be aware of factors making a port unsafe, while the master will not have such knowledge, nor have any reason to have it. It is possible, and fairly likely, that the charterer or consignee may have knowledge of the conditions at a given berth which make it unsafe, while the master will neither have, nor reasonably be charged with having, such knowledge. In such cases, it may well be that the charterer or consignee ought to be held liable, not because of the 'safe port' and 'safe berth' clauses, but because it ought to be held to be an actionable wrong for him to invite

> the ship without warning into a peril known to him, with or without the clauses. There may be cases, too, where the charterer or (more frequently) the consignee is so situated as reasonably to be charged with a duty of inquiry, particularly as to berth.
> Gilmore and Black, *The Law of Admiralty*, §4-4 at 205 (2d ed. 1975).

The special circumstances discussed above are clearly present in this case as respondent, in its triple capacity as Wharfinger, Sub-Charterer and shipper, knew or should have known the size of the vessel, the size of the wharf as compared to the size of the huge vessel (925 feet l.o.a.), and the effect of the river current on berthing procedures at its wharf.

The District Court herein found it unnecessary to decide if respondent was liable for breach of its obligation to provide a safe berth to the vessel on the basis that respondent had "violated a legal duty whether or not it also had a contractual duty." 396 F.Supp. at 858.

The Court of Appeals held that the safe berth clause did not mean that a safe berth had to be furnished the vessel:

> "The parties have cited no case in which this Court has interpreted the customary safe berth clause. The instant case does not afford us the opportunity to hold in favor of either the modern or the traditional view, for we are certain, in the circumstances here present, that the parties could not have intended the safe berth clause, whether by charter party or upon a third party beneficiary

> theory, to warrant the complete safety of the Bunge wharf. The facility, as it existed at the time when both charter parties were entered into, 'was not adequate for vessels the size of the Furness Bridge'. 396 F.Supp. at 857. It was 'unsafe' only in that it was too small for this vessel. Surely none of the parties who might be bound by or claim protection under the safe berth clause intended that Bunge would either rebuild its entire facility or accept absolute liability by virtue of a *boilerplate provision*. Under the circumstances, we conclude that there is no contractual liability because of an exception to the safe berth warranty: 'When a charter names a port and the master proceeds there without protest, the owner accepts the port as a safe port, and is bound to the conditions that exist there'. *Pan Cargo Shipping Corp. v. United States*, 234 F.Supp. 623, 638 (S.D.N.Y. 1964). See also Smith Jr., *Time and Voyage Charters: Safe Port/Safe Berth*, 49 Tul. L. Rev. 861, 869-70 (1975)." 558 F.2d at 801-802 (Emphasis Supplied).

The Court of Appeals recognizes and does not dispute that the berth was unsafe, but does say that "it was 'unsafe' only in that it was too small for this vessel," as if this fact is sufficient to excuse the failure of respondent to provide a safe berth.

In *The GAZELLE*, 128 U.S. 474 (1888) the Port of Aalberg, Denmark was an unsafe port for the *GAZELLE* only because of the size of the *GAZELLE* (her draft would not permit her to cross a bar which crossed the mouth of a fiord or inlet on which Aalberg was located.) However, the

charterers were liable for nominating a port "unsafe" for that particular vessel.

In *Mencke v. A Cargo of Java Sugar,* 187 U.S. 248 (1902) the charterers nominated a berth above the Brooklyn Bridge. The vessel in question could not pass under the bridge without first cutting off the tops of her steel masts. The master refused to pass under the bridge and discharged his cargo at a berth below the bridge.

> "In such a condition of affairs we think that resort to lighterage was natural and reasonable and within the obvious and fair import of the terms of the charter party. The clause, which is claimed to give the charterers or their assigns the right to appoint the dock in which to discharge cargo contains conditions that the port must be safe, and that the vessel must discharge always afloat, either at a safe port or so near the port of discharge as she can safely get. It would not be a just exercise of the right to select a dock in getting to which the vessel could not always be afloat or to which she could not safely get. A ship could not be said to be afloat, whether the obstacle encountered was a shoal or bar in the port over which she could not proceed, or a bridge under or through which she could not pass; nor could she be said to have safely reached a dock if required to mutilate her hull or her permanent masts." 187 U.S. at 253.

The obligation to provide a safe berth is just that. The Court of Appeals' decision reads the safe berth clause out of the Charter Parties. Respondent assumed a contractual obligation to provide the M/V FURNESS BRIDGE with a safe berth. The berth supplied was unsafe because it was inadequate for the M/V FURNESS BRIDGE. As a result of the inadequacy of the berth, the vessel had claims presented against it as well as suffering damage to itself. Liability on the part of respondent is open and obvious.

The proposition that for a berth to be safe it must be safe for the particular vessel in question has received consistent support from British cases and admiralty authorities. *See generally Leeds Shipping Co. v. Societa Francaise Bunge,* [1958] 2 Lloyd's List L.R. 127 (C.A.); T. Carver, *Carriage by Sea,* 3 British Shipping Laws ¶977 at 810 (11th ed. R. Colinvaux 1963), T. Scrutton, *Charterparties and Bills of Lading* 111-12 (17th ed., McNair, Mocatta & Mustill 1964).

The Court of Appeals herein also rested its decision on this point on the alternate and dubious grounds that where the master proceeds to a port without protest the owner accepts it as a safe port and is bound to the conditions existing there. The authority cited in support of this proposition is *Pan Cargo Shipping Corp. v. United States,* 234 F.Supp 623 (S.D.N.Y. 1964).

The facts in *Pan Cargo* clearly show that that case is distinguishable and is not proper authority for the proposition asserted by the Court of Appeals. *Pan Cargo* involved the Arab League blacklist of vessels trading with Israel, the United States Navy, Pan Cargo Shipping Corporation, and the vessel M/V NATIONAL PEACE. The M/V NATIONAL PEACE had one trip to Israel while named the M/V MEMORY. Shortly after this voyage Pan Cargo Shipping changed the name of the vessel to M/V NATIONAL

PEACE. At about the same time of this name change, a New York corporation, National Shipping & Trading Corporation, bought the S/T BIRCH COULIE, which was of United States registry. National had substantially the same ownership as Pan Cargo Shipping. National changed the registry of the S/T BIRCH COULIE to Liberian, sold the vessel to Panexito Compania Naviera S.A. (which had the same or substantially the same ownership interests as did National), Panexito changed the name of the BIRCH COULIE to MEMORY and entered it on a regular run to Israeli ports. Pan Cargo Shipping had full knowledge that Arab countries were maintaining a blacklist of vessels which called at Israeli ports.

With this background, Pan Cargo Shipping chartered the NATIONAL PEACE (ex-MEMORY) to the United States Navy for a voyage from Saudi Arabia to the United States (this charter was expanded to two voyages). When the NATIONAL PEACE arrived alongside the berth at Ras Tanina, Saudi Arabia, it was inspected by a Saudi Arabian health official who reviewed *all* the vessel's logs and discovered the former voyage to Israel while sailing as the MEMORY. The NATIONAL PEACE was summarily ordered out of berth and was refused permission to load any Saudi Arabian cargo until the blacklist matter was concluded.

The vessel was ultimately unable to perform under the Charter Party and the Navy cancelled the Charter Party. Pan Cargo Shipping sued the Navy for wrongful cancellation of the Charter Party. Pan Cargo Shipping said that the Navy was obliged to furnish a safe port and that this included a politically safe port. The District Court rejected the argument by noting that the port had been accepted by the

master and owner without protest and the owners could not now object to conditions there.

In *Pan Cargo* the owners were aware of the blacklist, the fact that the NATIONAL PEACE was subject to being placed on the blacklist, contrived to mislead the Arab League with the MEMORY (ex-BIRCH COULIE) and failed to inform the Navy, charterers, of any of this.

The bald-faced proposition that owners of a vessel are bound by the conditions at a port once the master proceeds there without protest is contrary to this Court's decision in *Mencke v. A Cargo of Java Sugar*, 187 U.S. 248 (1902) and to the decisions of the Second Circuit in *Park S.S. Co. v. Citites Service Oil Co.*, 188 F.2d 804 (2d Cir.) *cert. denied* 342 U.S. 862 (1951); *Venore Transp. Co. v. Oswego Shipping Corp.*, 498 F.2d 469 (2d Cir. 1974).

In *Mencke* the master proceeded to the port nominated by the charterer without protest, but refused to proceed to the berth. The master's lack of protest as to the port did not relieve the charterers of their obligation to furnish a safe port.

In *Park S.S. Co. V. Cities Service Oil Co.*, 188 F.2d 804 2d Cir. *cert. denied* 342 U.S. 862 (1951) owners sued charterers to recover damages resulting from two groundings in Hingham Bay, Massachusetts on consecutive voyages. On both occasions the vessel was piloted by the same pilot and groundings ensued. The Court of Appeals for the Second Circuit placed the purpose and intent of the customary safe berth clause in proper perspective:

> The purpose of the clause also supports the construction we give it. The charterer wishes to control the manner and place of discharging its cargo. The most advantageous place for the charterer will be a wharf at the refinery. If the discharge is into lighters the closer the ship can get to the refinery the less the cost of lighterage. Hence the charterer bargains for the privilege of selecting the precise place for discharge and the ship surrenders that privilege in return for the charterer's acceptance of the risk of its choice. 188 F.2d at 806.

The second grounding occurred at a point some 400 yards away from the location of the first grounding on a shallow spot not shown on charts. There was no duty to intervene with the pilot's decision (the pilot was held to be the servant of charterer in selecting the anchorage) unless the pilot was doing something obviously dangerous.

> "[T]he officers' knowledge of the first (December) grounding gave them no reason to question the pilot's judgment in selecting the January anchorage. They were not negligent in failing to intervene *unless the pilot was doing something obviously dangerous. Moreover, since the officers had no knowledge of the danger, the charter party was an express assurance that the berth was safe, on which they were entitled to rely.*[4] Footnote 4 - *Cities Service Transportation Co. v. Gulf Refining Co.*, 79 F.2d 521 (2d Cir. 1935)." 188 F.2d at 806 (Emphasis supplied)

See also Venore Transportation Co. v. Oswego Shipping Corp., 498 F.2d 469 (2d. Cir. 1974).

In *Venore Transportation Co.*, the Court of Appeals for the Second Circuit considered a claim by the owner *pro hac vice* against both time and voyage charterers for breach of warranty of safe berth. The vessel berthed at a wharf which was missing a fender designed to protect the vessel from the wharf and vice versa. The master's action in going into the berth were considered not from the standpoint of binding the owner to the conditions at the berth but were considered rather from the standpoint of intervening negligence which would relieve the charterers of liability. No such negligence was found and the charterers were liable for the damages sustained.

The British law on the charterer's obligation to provide a safe berth requires simply that the berth be safe in relation to the particular vessel. The master's action in going into an unsafe berth nominated by the charterer does not lessen the charterer's liability unless the master's actions are unreasonable or operate as an intervening negligent act. *See The DAGMAR*, [1968] 2 Lloyd's List L.R. 563, 571-72, 585-86 (Q.B.); *Leeds Shipping Company Ltd. v. Societe Francaise Bunge*, [1958] 2 Lloyd's List L.R. 127 at 131, 136, 144; *Reardon Smith Line Ltd. v. Australian Wheat Board*, [1956] 1 Lloyd's List R.L. 1, 7, 10 (P.C.); *Compania Naviera Maropan S.A. v. Bowater's Lloyd Paper Mills, Ltd.* [1954] 2 Lloyd's List L.R. 397, 411-12, 415 (Q. B.); *Grace v. General Steam Nav. Co.*, 83 Lloyd's List L.R. 297, 308 (K.B. 1949).

A leading British admiralty authority demonstrates that the Court of Appeal herein was in error in its treatment of

the safe berth clause:

> Whether a port is a 'safe port' is in each case a question of fact and degree and must be determined with reference to the particular ship concerned, assuming that she is properly manned and equipped and navigated and handled without negligence and in accordance with good seamanship. As a broad statement of the law a port will not be safe unless in the relevant period of time, the particular ship can reach it, use it and return from it without, in the absence of some abnormal occurrence, being exposed to danger which cannot be avoided by good navigation and seamanship.
>
> Thus, dangers likely to be incurred on the voyage to the port may affect its safety and a port is not necessarily safe because at the moment when the vessel gets to it, and in the weather then prevailing, she can get into it with safety. A temporary danger or obstacle, such as neap tides, will not render a port unsafe; to do so the danger or obstacle must be operative for a period which, having regard to the nature of the adventure and of the contract, would involve inordinate delay.
> T. Scrutton, *Charterparties and Bills of Lading* 111-112, (17th ed. McNair, Mocatta & Mustill 1964), (citations omitted).

When the charterer does not supply a safe berth to the vessel, an intervening act of negligence of the master, if he did not rely on the information about the safeness of

the berth and if the master has, with full knowledge, accepted the berth, can result in damages being divided. *Ore Carriers of Liberia v. Navigen Co.*, 1971 A.M.C., 505, 507-08 (S.D.N.Y. 1969) *aff'd* 1971 A.M.C. 513 (2d Cir. 1970); *Universal Tramp Shipping Co. v. Irish Salt Mine Co.*, 1970 A.M.C. 1783, 1784 (D. Mass. 1970); *Constantine & Pickering S.S. Co. v. West India S.S. Co.*, 199 F. 964, 968 (S.D. N.Y. 1912); and *Cities Service Transp. Co. v. Gulf Refining Co.*, 79 F.2d 521 (2d. Cir. 1935). Presumably since *Reliable Transfer* damages would not be divided but would be apportioned according to the percentage of fault.

A clear and concise statement of the safe berth warranty of the charterer in the dilemma of the master faced with a problem with both the safety of his vessel and the obligation to follow the charterers' orders and prosecute the voyage was given in *American President Lines, Ltd. v. United States*, 208 F.Supp. 573 (N.D. Calif. 1961):

> "The decisions involving the so-called 'safe-port' and 'safe-berth' provisions in charter party agreements make it very clear that a charterer cannot escape liability for damage ultimately resulting from a directive that the chartered vessel go to an unsafe port or berth merely because the captain in attempting to comply, follows an obviously risky course of action in preference to an available alternative which might have avoided the damage. In most of the decisions finding liability on the part of the charterer there was a danger foreseeable to the captain and an available alternative.[1]

"The decisions recognize that when a charterer directs a vessel to a port the captain believes to be unsafe, he is confronted with a difficult dilemma. He may refuse to comply, thus thwarting the desires of the charterer and assuming the risk of an ultimate determination that the port was not in fact unsafe. Or, he may attempt to comply, and run the risk of making a miscalculation in seeking to avoid the danger to which the charterer's directive has subjected the vessel. When a captain has been placed in such a dilemma by a charterer's breach of contract in directing the vessel to an unsafe port, the entire burden of responsibility for the safety of the ship cannot legally be shifted to the captain. If the captain elects to attempt to comply with the charterer's directive, it would be inequitable to relieve the charterer of liability for harm caused by the peril which his wrongful demand created merely because the captain's choice of alternative courses, which give promise of avoiding such peril, proves to be incorrect. Thus, the applicable decisions have established the principle that the charterer is not relieved of legal responsibility for the consequences of his breach of contract unless the course followed by the captain is so imprudent that it can fairly be said to be an intervening act of negligence.[2] It is not enough that the course followed by the captain entails some foreseeable risk of harm. For, some risk is inherent in any attempt to proceed to an

unsafe port. To constitute an intervening act of negligence, the course followed by the captain must entail an unreasonable risk.[3]

"In the present case the Board of Contract Appeals found that the Government breached the charter party agreement by directing the PRESIDENT ARTHUR to load at the unsafe port of Villa do Porto. The master of the PRESIDENT ARTHUR was initially unable to enter Villa do Porto because of the hazardous weather conditions. But, in an effort to comply with the Government's demand that cargo be loaded there, he followed the Port Captain's suggestion that he anchor in Sao Lourenco Bay to await an improvement in the weather. The Board of Contract Appeals found that this course entailed a foreseeable risk of harm because of the very weather conditions which made Villa do Porto an unsafe port. It also found that the master had an available alternative in that he might have skirted the island until the weather improved. It concluded that it necessarily followed that the damage suffered by the PRESIDENT ARTHUR at Sao Lourenco Bay was not the proximate result of the Government's demand that she load cargo at Villa do Porto. In so concluding the Board committed an error of law. For the law, as established by the cited decisions, is that action taken by a master in an effort to comply with the demand of a charterer that he proceed to an unsafe port does not constitute an intervening act of negligence merely because the action taken entails some foreseeable risk. To break the chain of

causation, the master's action must entail a risk that is unreasonable under all the circumstances. Upon the facts found by the Board in respect to the nature of the risk in anchoring in Sao Lourenco Bay and the available alternative, it must be concluded as a matter of law that the risk was not an unreasonable one for the master to take. There was thus no act of the master sufficient in law to break the chain of causation linking the Government's breach of contract with the damage sustained by the PRESIDENT ARTHUR at Sao Lourenco. It follows that the Government is liable for such damage.

Footnote 1: See e.g., Reardon Smith Line Ltd. v. Australian Wheat Board, 1956 Appeal Cases 266; Compania Naviera Maropan v. Bowaters, 2 Q.B. 68 (1955); G.W. Grace & Co., Ltd. v. General Steam Navigation Co., Ltd., 2 K.B. 383 (1950); P. Dougherty Co. v. Bader Coal Co., 244 F.267 (D.C. Mass. 1917); The Northman, 189 F. 33 (2 Cir. 1911).

Footnote 2: Reardon Smith Line Ltd. v. Australian Wheat Board, 1956 Appeal Cases 266; Compania Naviera Maropan v. Bowaters, 2 Q.B. 68 (1955)); G. W. Grace & Co., Ltd. v. General Steam Navigation Co., Ltd., 2 K.B. 383 (1950).

Footnote 3: Cases cited in note 2, supra."

208 F.Supp at 576-77.

The court in *The GAZELLE* and in *Mencke* held that a

berth had to be suitable for the vessel which was to call at that berth. In this case, the appellate court specifically holds that the berth was too small for this vessel, yet the appellate court does not hold the charterer-wharf owner in any way responsible for providing an admittedly inadequate berth. The master of the M/V FURNESS BRIDGE did not know the length of the breasting area of the wharf and did not know that his vessel could not come into contact with what turned out to be a mooring dolphin. The master did not want to go into berth at night, but when the sub-charterer threatened to take the vessel off-hire as to the prime charterer, which would not have effected the owner, the master decided to go into the wharf as he wanted to cooperate, if at all possible.

The safe berth clause is designed to regulate the actions of a charterer in designating a particular berth which is economically most advantageous to him. The vessel owner and master have no specific knowledge of the berth designated by the sub-charterer, and are entitled to rely on the warranty of the sub-charterer that a safe berth will be provided. The decision of the Fifth Circuit Court of Appeals does violence to this contractual arrangement and will have an effect on innumerable future charter party disputes if allowed to stand undisturbed by this Court.

CONCLUSION

This question has extreme importance to all admiralty cases in the United States whenever there is an allision when a vessed is berthing, especially when a relatively new large vessel is berthing at an old inadequate berth, and separate and apart from the wharfinger's duty, whenever there is a safe berth clause in a charter party.

The Fifth Circuit, by its decision below, set forth the completely erroneous and incorrect rule of law that open and obvious defects, or defects which could possibly be known by the vessel if a detailed investigation of the facility were made by the master, creates absolute liability on the vessel when the wharfinger-charterer knows or should know all the particulars of the vessel and knows or should know all the particulars of his berth, and therefore, knows or should know that the berth is insufficient for the vessel which he has invited to his berth. This is contra to this Court's holdings in, and the logical legal conclusions derived from, *Smith v. Burnett, supra*, and *United States v. Reliable Transfer Co., supra*, and various decisions of other circuits. If this Court should conclude that it is not in direct conflict with the decisions of this Court, then it is a question *res nova* for this Court which is extremely important in any allision case in this country and writs of certiorari should be accepted by this Court to determine the status of this area of law.

Further, the Fifth Circuit, by its decision, completely writes out of all charter parties the safe berth or safe port clauses as being "boilerplate". This flies in the face of decisions of this Court in *The GAZELLE, supra*, and *Mencke v. A Cargo of Java Sugar, supra*, as well as decisions of the Second Circuit and writings by legal scholars such as Gilmore and Black and Scrutton as well as the British case law.

For the foregoing reasons, petitioner prays that this writ of certiorari be granted.

Respectfully submitted,

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CERTIFICATE

I hereby certify that a copy of the above and foregoing Petitioner's Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit has been this day forwarded to respondent's counsel of record, Nigel E. Rafferty, Esquire, 1424 Whitney Building, New Orleans, Louisiana 70130, by hand delivering him a copy on this 18th day of January, 1978.

New Orleans, Louisiana, this 18th day of January, 1978.

J. DWIGHT LeBLANC, JR.

APPENDIX A
OPINION OF DISTRICT COURT

BUNGE CORPORATION

v.

MV FURNESS BRIDGE, her engines, tackle, apparel, etc., in rem, Furness Withy & Co., Ltd., in personam.

Civ. A. No. 74-1656.

United States District Court,
E. D. Louisiana.
May 23, 1975.

Dock owner brought action in rem against vessel and against vessel owner in personam to recover for damage which the vessel inflicted on mooring dolphin while attempting to berth at wharf, which was less than half the length of the vessel. The District Court, Alvin B. Rubin, J., held that a wharfinger has the duty to use due diligence to provide a safe berth, that wharfinger breached such duty by its failure to give caution about the size and structure of wharf, about the hazards to the unfendered dolphins located a short distance past line of the wharf, about the need of so large a vessel using four tugs and by urging berthing at night, that vessel was not blameless since knowing that the facility was unfamiliar the captain succumbed to the invitation to move in darkness and although he knew that four tugs would have been better he chose to save cost by using three tugs and approached at an angle that caused his bow to strike the dolphin and that since fault was mutual damages were to be divided equally.

Judgment for plaintiff.

John Blackwell, New Orleans, La., for plaintiff.

J. Dwight Le Banc, Jr., New Orleans, La., for defendants.

ALVIN B. RUBIN, District Judge:

[1] The Father of Waters had been navigated by Indian canoe and pirogue, log raft and paddle wheel, submarine and cargo ship, but it had never accommodated anything the size of the M/V Furness Bridge. On January 15 and 16, 1974, this 965 foot vessel, largest ever to enter the river,[1] attempted to berth at the Bunge docks on the left descending bank of the river near Destrehan. It nudged a mooring dolphin, causing barely perceptible damage to the vessel, leaving a score mark a few feet long. But the massive force caused an alleged $100,000 in damage to the dolphin. Invoking the presumption, long established in admiralty, that, when a vessel strikes a wharf or other fixed object, which stands mute and defenseless, the vessel is at fault,[2] the owners of the dock seek to recover the damages. But the vessel's owners

1. The Furness Bridge had 91,079 tons gross registered tonnage, and 166,064 dead weight tons. The Manhattan, a larger ship, had been upriver sixteen months before, but it had somewhat less gross tonnage.

2. Ford Motor Co. v. Bradley Transp. Co., 6th Cir. 1949, 174 F.2d 192; Humble Oil and Refining Company v. S.S. Napier, S.D.N.Y. 1967, 1968 AMC 448; Sabine Towing & Transportation Co. v. St. Joe Paper Co., N.D. Fla.1958, 297 F.Supp. 748.

say there is more to the story than that, and the case cannot be decided by simplistic presumptions. Here, then, are the other facts.

I.

Bunge owns and operates a grain elevator and dock. The dock consists of a steel piled wharf with five mooring dolphins, two located upstream of the wharf and three located downstream of the wharf. The total distance between the dolphins is 820 feet. The dolphins are recessed about 2 feet from a line that would run along the face of the wharf, do not serve as breasting dolphins, and do not have fenders. There should be no contact between them and a ship entering or leaving the dock. The positions of the mooring dolphins as well as the fact that they do not have fenders is obvious, at least in day light, as they are in plain view.

Bunge's wharf has an area capable of withstanding breasting forces 470 foot long. If the dolphins were capable of withstanding a breasting force, they would add to the frontage against which a vessel might breast; but, as they stand, they do not. In addition, since their maximum span is 820 feet, they afford no facility for putting out lines fore and aft of the vessel itself.

The wharf was designed only to accommodate vessels under a displacement tonnage of 33,750 tons, mooring at a velocity of ¼ of a foot per second (less than one mile per hour), and approaching the wharf at an angle of

10 degrees or less. By contrast, the Furness Bridge displaced 112,000 tons.

The Furness Bridge is more than twice as long as the wharf; its length and bulk make great care necessary in berthing it, for the unprotected dolphins are not designed to take breasting forces. Elementary geometry demonstrates that a vessel twice the length of the wharf may strike one of the dolphins if it approaches at an angle of 3 degrees,, while a 400 foot vessel would have to approach at a greater angle or miss the wharf completely before striking the dolphin.

The Furness Bridge was under the exclusive custody and control of employees of Furness Withy; it was operating under a time charter to Seabridge, who voyage subchartered to Bunge. Both charters contained "safe berth" clauses but the Bunge-Seabridge charter did not incorporate the Furness Withy-Seabridge charter nor did Bunge make any independent stipulations in favor of Furness Withy.

During the daylight hours of January 15, 1974, the Furness Bridge was lying upriver from the Bunge dock. Toward the end of the day, Bunge ordered the vessel into berth that night. The master objected and asked that he be permitted to wait until morning. Bunge replied that, if the vessel was not ready to berth at night, it would be taken off hire until it proceeded. The master then undertook to attempt a berth.

What happened during the berthing is much disputed but I am persuaded that a preponderance of the credible evidence indicates that Bunge gave only the rudimentary instruction about berthing procedures; it informed the vessel that the custom was to drop both anchors upriver of the berth, then drop back and dock alongside. The owner's agent sought no instructions as to whether three or four tugs were needed; having docked at New Orleans with three, having no warning that this number would be insufficient, he ordered three. Hindsight demonstrates that using four would have been much safer.

The Furness Bridge was navigated stern first downriver, using the current, and maneuvered in crab-fashion towards the dock, using lines and cables. When it was about fifty feet off the dock it began to move into the berth. A line was put ashore from the bow to the upstream dolphin. A few minutes later the aft line was put ashore. As the vessel moved in the river the fog increased, obscuring visibility at the river level, although the lights atop the docking facility were clear. The vessel was moving forward and upriver toward the dock, at an angle of less than 5°, when the starboard side of the bow struck the upriver dolphin. At the time the vessel was moving at a slow speed, using considerable caution.

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The vessel thereafter completed berthing and was moored alongside fore and aft at 0025 hours on January 16, 1974. However, she had to keep one tug in attendance at all times to keep her bow next to the wharf. In spite of these efforts, she broke away from the wharf at approximately 2020 on January 16. During the time the vessel was alongside, she pulled 4 bollards or cleats off the Bunge facility.

The M/V Furness Bridge redocked a day later in daylight using 4 tugs. This time the docking was without incident.

II.

It is evident that larger vessels require more space and time to turn or to stop, and the exercise of more care in berthing than smaller vessels. But the difference in size creates differences of vast degree. The kinetic energy of a vessel increases proportionally with its displacement multiplied by the square of the speed.[3] Hence the force of impact from the larger vessel becomes massively larger.

3. Ringdal, Some Liability Aspects of Navigation and Berthing of Very Large Tankers, Lecture given at the 5th Scandinavian Maritime Law Seminar, Sandefjord, Oct. 12, 1972, at 159.

Angles and distances perfectly safe when a vessel relatively small in relationship to a dock is coming alongside threaten damage when the size of the vessel substantially exceeds the size of the dock. In such instances, if the vessel is ordered to berth at a dock in a certain manner, and damage either to the vessel or dock results, this may be caused by negligence on the part of the vessel or on the part of the berthing master, or both.

> Negligence by the vessel in berthing invaribly involves approach speed and angle. Traditionally the vessel encounters an insurmountable handicap: When the mishap occurred the berth was at rest—the vessel was in motion. In the U.S.A. this simple fact has led to a legal presumption of negligence against the vessel, but that does not really solve all problems.[4]

In order that a tanker may berth with a minimum risk of damage to ship and shore installations, four criteria must be met:

1. The berth must have a sufficiently solid construction, and must be adequately dimensioned to receive a large vessel under defined approach conditions.

4. Id. at 157.

2. The berth must not have defects, weaknesses, or previous damages that render the applicable berthing criteria untenable.
3. The berthing instructions and procedures for the particular vessel, established on the basis of the shock absorbing ability of the berth structure, must have been clearly and correctly defined, and the vessel must have been properly notified about the relevant factors.
4. The vessel must receive the necessary assistance and cooperation from the shore that will enable her to meet the berthing requirements.[5]

[2] Hence, under English law, a quay owner, inviting a vessel to use his quay, must exercise due diligence to ascertain whether it can berth safely without suffering damage.[6]

III.

A considerable part of the preceding discussion cites as authority a single paper delivered at a Scandinavian maritime law seminar. If this were relied upon as legal authority, its value might well be questioned. But the forces of physics are as universal with respect to matter as logic is with respect to reasoning.

5. Id. at p. 157, 158.
6. Id. at p. 160.

[3, 4] Ships and wharves are old. The legal concepts that govern their relationships, taking into account their respective sizes, are traditional and also ancient. But the concepts must be adjusted to meet the new technology of vessel construction. Supertankers may call for super precautions on the part of those who invite them to berth at facilities designed for lesser vessels. The owners of structures available for public use have a duty to act prudently. The owner knows the design features and shock absorbing capacity of the berth. The owner knows hazards not fully perceived by the mariner even though the physical objects creating them may be in plain sight. A fortiori, the owner knows the hazards not clear at night or in fog.

[5] Bunge asserts that the only relevant issue is whether the size of the vessel compared with the size of the wharf made damage to the wharf the logical outcome of a proper docking. It is impossible to accept this dogmatic statement. The issue is whether the berth owner was negligent under all the circumstances, either by doing something it should not have done or by failing to do something that, considering its knowledge and facilities, it should have done. Extra care is due when the chance of damage is great even though mishap is not inevitable. The wharfinger is not entitled to expect a perfect berthing but only a normal one. If a normal berthing may create risk, extra care is required.

[6] That, with the benefit of hindsight, daylight, and four tugs, the Furness Bridge made a subsequent docking without damage is not proof that only vessel negligence accounted for the mishap in the earlier night. The expert witness called by the vessel gave credible and convincing testimony that the facility was not adequate for vessels the size of the Furness Bridge. Literally, a thousand smaller vessels have docked at the facility since it was constructed without damage, but this proves nothing but the correctness of his testimony; the wharf was adequate for a smaller ship.

Only three vessels of mammoth size have used the facility. The Furness Bridge had the greatest tonnage. The Manhattan, which arrived without problem, was even longer, but somewhat lighter. The Ultramar, a vessel only slightly smaller than the Furness Bridge, also had docking problems.

It will not do to draw easy parallels between a 600 foot vessel or a 700 foot one, or even an 800 foot one, and a vessel 965 feet long. The extra 165 feet is itself the length of a seagoing vessel. The super vessel not only is longer; it is greater. Every 100 feet of extra length creates greater cubic size; every additional 10,000 tons creates greater mass and larger kinetic forces

IV.

[7-9] The wharfinger's duty to use due diligence to provide a safe berth is well established. Not of course an insurer, the wharfinger owes merely the duty of reasonable diligence. Berwind-White Coal Mining Co. v. City of N.Y., 2d Cir. 1943, 135 F.2d 433, 445. See also Schwerman Trucking Co. v. Gartland Steamship Co., 7 Cir. 1974, 496 F.2d 466: The wharfinger is obliged "to warn a ship of any unexpected hazard or deficiency known to the wharfinger, or which, in the exercise of reasonable care, he should have known." Medomsley Steam Shipping Co. v. Elizabeth River Terminals, Inc., 4 Cir. 1966, 354 F.2d 476, 480. As that case points out, what constitutes a "safe berth" cannot be categorically described; it is simply one that is reasonably safe under the facts and circumstances of each case. A particular ship must be able to reach the berth, use it, and return from it without being exposed to danger that cannot be avoided by good navigation and seamanship. This is in accord with the view taken in Smith v. Burnett, 1899, 173 U.S. 430, 19 S.Ct. 442, 43 L.Ed. 756, where the shipowner sued for damage done to the vessel by a submerged rock that the wharfinger had negligently allowed to remain in the bed of the river within the limits of the berth at the wharf. The Court said that, if the wharfinger has knowledge that the place for unloading is improper, he should adopt one of several courses. He should

either not invite the vessel to dock at the inadequate facility or he should inform the vessel of the condition of things when she is invited to dock so that injury may be avoided. See also White Stack Towing Corp. v. Hewitt Oil Co., 4th Cir. 1954, 216 F.2d 776.

[10, 11] Cases that are rigged exactly like the present one have not been found. The point is new. Authorities are cited merely to demonstrate the principle; the wharfinger has the duty of exercising such care as a prudent person would under like circumstances. Here the evidence shows that it did not. It failed to give full caution about the size and structure of the wharf, about the hazards to the unfendered dolphins just a short distance past the line of the wharf, about the need of so large a vessel using four tugs, and it urged berthing at night.

Much has been made in briefs about whether, since Bunge subchartered the vessel under a charter party containing a safe berth clause, it had a contractual obligation to provide a secure berth. The clause is in customary terms; it obliges the vessel to discharge cargo "at any wharf or place that Charterers or their Agents may direct, provided the vessel can safely be always afloat at any time or tide." Furness Withy argues that the clause implies a duty by the charterer to furnish a safe berth and imposes liability for its failure to do so, and that Bunge is obligated to Furness Withy by it because the charter to Seabridge contained the same clause.

Bunge not only disputes this interpretation of the contract; it contends that, whatever its contractual obligation, the duty was due only to Seabridge; it had no contract with Furness Withy.

At least on its face the safe berth appears merely to exonerate the owner from any duty to berth the vessel at a place its master deems unsafe. There are authorities that read the clause more broadly, and find that it implies a contractual duty to provide a completely safe berth. See, e. g., Venore Transportation Co. v. Oswego Shipping Corp., 2d Cir. 1974, 498 F.2d 469; Paragon Oil Co. v. Republic Tankers, S.A., 2d Cir. 1962, 310 F.2d 169; Park S.S. Co. v. Cities Service Oil Co., 2d Cir. 1951, 188 F.2d 804; Athina Shipping Co. v. Amerada Hess Corp., M.D. Fla. 1971, 1972 AMC 796; Universal Tramp Shipping Co. v. Irish Salt Mining Co., D.Mass.1970, 1970 AMC 1783; Red Star Barge Line, Inc. v. Lizza Asphalt Construction Co., E.D.N.Y. 1959, 164 F.Supp. 97, aff'd. 2d Cir. 1959, 264 F.2d 467. But some at least take the view that the clause means merely what it says and does not operate to shift to the wharfinger liability that would otherwise attach to the vessel. See Gilmore & Black, The Law of Admiralty § 4–4 at 204 (2d ed. 1975).

Under the circumstances of this case these authorities appear not to be controlling. But what is important is that Bunge, being a subcharterer, knew the precise characteristics of the vessel.

Bunge also knew of the current in the river, the layers of river fog, the visibility problems encountered in docking at night, and the exact limitations of its wharf. It failed to take all of these factors into account and give the necessary warnings to the master or take other precautions against damage. It has violated a legal duty whether or not it also had a contractual one.

V.

[12, 13] But, while the wharfinger failed to use all due care, the vessel was not blameless. Knowing that the facility was unfamiliar, the captain succumbed to the invitation to move in darkness. While three tugs might have been adequate, four would, he knew from his own experience, have been better; he chose to save cost. And while he did not enter on an angle of ten degrees as charged, he did approach at an angle that caused his bow to strike the dolphin.

In sum, I conclude that there was mutual fault, and that damages should therefore be divided. This is not a choice of the easy way out. Insofar as the wharfinger is concerned, this result places on him a responsibility not previously adjudicated. And the vessel owner may demur that the trier of facts

dared, but did not dare enough. However, au fond, this decision is based on simpler concepts. At sea or on land, negligence is failure to use due care under all the circumstances. Wharfinger and master each failed in some regards. Each is then at fault.

The damages that may be proved are to be divided equally between the parties. While the recent Supreme Court decision in United States v. Reliable Transfer Co., Inc., 421 U.S. 397, 95 S.Ct. 1708, 44 L.Ed.2d 251 (1975), requires an apportionment of damages according to the degree of fault of the parties, the fault here was equal. Accordingly, judgment is entered in favor of Bunge Corporation for one-half of the difference between the damages which Bunge may later prove and the damages which Furness, Withy & Co. may prove.

APPENDIX B

OPINION OF CIRCUIT COURT OF APPEALS

CORRECTED

BUNGE CORP. v. M/V FURNESS BRIDGE

BUNGE CORPORATION,
Plaintiff-Appellant
Cross-Appellee,

v.

M/V FURNESS BRIDGE, her engines, tackle, apparel, etc., in rem,
Defendant,

Furness Withy & Co., Ltd., in personam, Defendant-Appellee
Cross-Appellant.

No. 75-2695.

United States Court of Appeals,
Fifth Circuit.

Sept. 2, 1977.

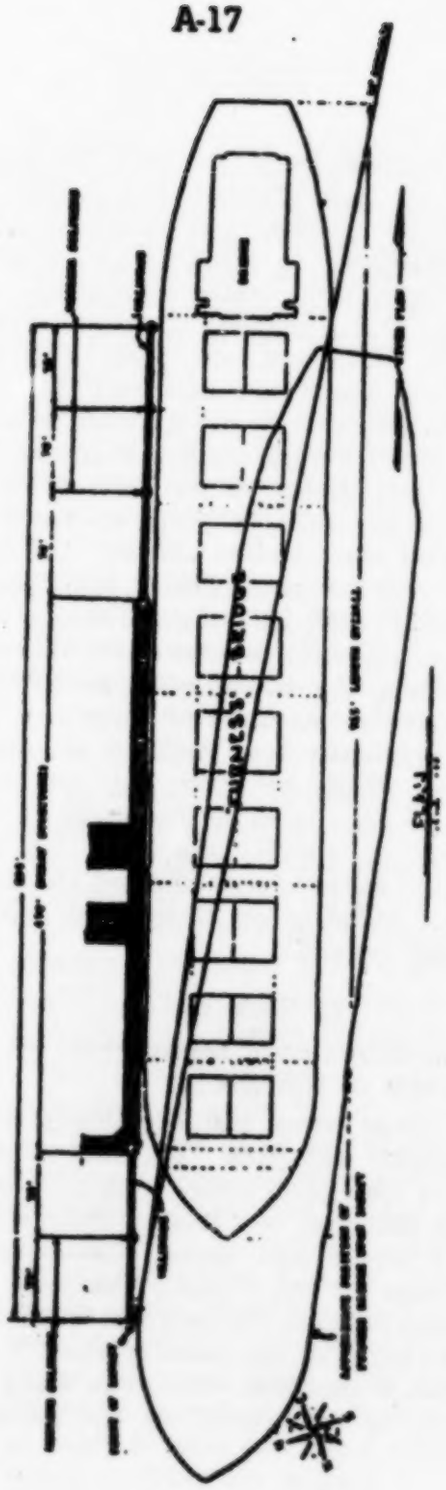
Appeals from the United States District Court for the Eastern District of Louisiana.

Before GEWIN, AINSWORTH and SIMPSON, Circuit Judges.

SIMPSON, Circuit Judge:

Bunge Corporation, a wharf owner, brought suit in rem against the M/V Furness Bridge and in personam against her owner, Furness Withy and Co., for damage which the vessel inflicted upon a mooring dolphin while attempting to berth at the wharf.*

* This scale drawing is prepared from Exhibits before the trial court.



The district court held that the negligence of both plaintiff and defendant caused the accident and equally divided the damages. In reaching this conclusion, the district court emphasized the special characteristics of the Furness Bridge, which was more than twice the length of the Bunge dock and then the largest ship ever to navigate the Mississippi river: "Supertankers may call for super precautions on the part of those who invite them to berth at facilities designed for lesser vessels." *Bunge Corp. v. MV Furness Bridge*, 396 F.Supp. 852, 856 (E.D.La.1975). Taking into account the relative sizes of the ship and the wharf, the district court held Bunge to a stricter standard of care than has ever previously been required of wharfingers. While we agree that the standard of care must be measured in the context of specific situations, we feel that the district court imposed too stringent a standard on Bunge and reverse on that ground.

I. THE FACTS

The district court has concisely set out the facts of this case:

> Bunge owns and operates a grain elevator and dock. The dock consists of a steel piled wharf with five mooring dolphins, two located upstream of the wharf and three located downstream of the wharf. The total distance between the dolphins is 820 feet. The dolphins are recessed about 2 feet from a line that would run along the face of the wharf, do not serve as

> breasting dolphins, and do not have fenders. There should be no contact between them and a ship entering or leaving the dock. The positions of the mooring dolphins as well as the fact that they do not have fenders is obvious, at least in day light, as they are in plain view.
>
> Bunge's wharf has an area capable of withstanding breasting forces 470 foot long. If the dolphins were capable of withstanding a breasting force, they would add to the frontage against which a vessel might breast; but, as they stand, they do not. In addition, since their maximum span is 820 feet, they afford no facility for putting out lines fore and aft of the vessel itself.
>
> The wharf was designed only to accommodate vessels under a displacement tonnage of 33,750 tons, mooring at a velocity of ¼ of a foot per second (less than one mile per hour), and approaching the wharf at an angle of 10 degrees or less. By contrast, the Furness Bridge displaced 112,000 tons.
>
> The Furness Bridge is more than twice as long as the wharf; its length and bulk make great care necessary in berthing it, for the unprotected dolphins are not designed to take breasting forces. Elementary geometry demonstrates that a vessel twice the length of the wharf may strike one of the dolphins if it approaches at an angle of 3 degrees, while a 400 foot vessel would have to approach at a greater angle or miss the wharf completely before striking the dolphin.

The Furness Bridge was under the exclusive custody and control of employees of Furness Withy; it was operating under a time charter to Seabridge, who voyage subchartered to Bunge. Both charters contained "safe berth" clauses but the Bunge-Seabridge charter did not incorporate the Furness Withy-Seabridge charter nor did Bunge make any independent stipulations in favor of Furness Withy.

During the daylight hours of January 15, 1974, the Furness Bridge was lying upriver from the Bunge dock. Toward the end of the day, Bunge ordered the vessel into berth that night. The master objected and asked that he be permitted to wait until morning. Bunge replied that, if the vessel was not ready to berth at night, it would be taken off hire until it proceeded.[1] The master then undertook to attempt a berth.

What happened during the berthing is much disputed but I am persuaded that a preponderance of the credible evidence indicates that Bunge gave only the rudimentary instruction about berthing procedures; it informed the vessel that the custom was to drop both anchors upriver of the berth, then drop back and dock alongside. The owner's agent sought no instructions as to whether three or four tugs were

1. The record is not clear on this point. See slip opinion at 5695-5696, — F.2d at ——, *infra*.

needed; having docked at New Orleans with three, having no warning that this number would be insufficient, he ordered three. Hindsight demonstrates that using four would have been much safer.

The Furness Bridge was navigated stern first downriver, using the current, and maneuvered in crab-fashion towards the dock, using lines and cables. When it was about fifty feet off the dock it began to move into the berth. A line was put ashore from the bow to the upstream dolphin. A few minutes later the aft line was put ashore. As the vessel moved in the river the fog increased, obscuring visibility at the river level, although the lights atop the docking facility were clear. The vessel was moving forward and upriver toward the dock, at an angle of less than 5°, when the starboard side of the bow struck the upriver dolphin. At the time the vessel was moving at a slow speed, using considerable caution.

The vessel thereafter completed berthing and was moored alongside fore and aft at 0025 hours on January 16, 1974. However, she had to keep one tug in attendance at all times to keep her bow next to the wharf. In spite of these efforts, she broke away from the wharf at approximately 2020 on January 16. During the time the vessel was alongside, she pulled 4 bollards or cleats off the Bunge facility.

> The M/V Furness Bridge redocked a day later in daylight using 4 tugs.[2] This time the docking was without incident.

396 F.Supp. at 854–55.

II. THE APPLICABLE STANDARD OF CARE

[1, 2] "It is well established that there is a presumption of fault against a moving vessel that strikes a stationary object, such as a dock or navigational aid." *Freeport Sulphur Co. v. S/S Hermosa*, 366 F.Supp. 952, 963 (E.D.La. 1973); *Brown & Root Marine Operators, Inc. v. Zapata Off-Shore Co.*, 377 F.2d 724 (5th Cir. 1967). "In admiralty, this presumption does more than merely require the ship to go forward and produce some evidence on the presumptive matter. The moving vessel must show that it was without fault or that the collision was occasioned by fault of the stationary object or was the result of inevitable accident".[3] *Patterson Terminals, Inc. v. S/S Johannes Frans*, 209 F.Supp. 705,

2. The vessel in fact redocked the following night, in darkness. Both parties concede that the district court is in error on this point.

3. Cases in this Circuit (See, e. g. *Brown & Root v. Zapata Off-Shore*, text, *supra*) establish that this presumption affects the burden of proof, not merely the burden of going forward with the evidence. Consequently, we reject the holding of the Third Circuit that when both sides had "fully presented testimony regarding their version as to what happened prior to the collision . . . the presumption disappeared as a matter of law". *Pennsylvania Railroad Co. v. S.S. Marie Leonhardt*, 320 F.2d 282, 284 (3d Cir. 1963). The Federal Rules of Evidence also reject this "bursting bubble" theory of presumptions. See Fed.R. Evid. 301 and accompanying Notes of Advisory Committee on Proposed Rules.

707 (E.D.Pa.1962), citing *Carr v. Hermosa Amusement Corp., Ltd.*, 137 F.2d 983, 985 (9th Cir. 1943). We have held that "[t]he burden is heavily upon the vessel asserting [the inevitable accident] defense. 'Such vessels "must exhaust every reasonable possibility which the circumstances admit and show that in each they did all that reasonable care required."' " *Brown & Root Marine Operators, Inc., supra*, 377 F.2d at 726. Furthermore, the presumption of negligence is amply supported by logic and experience:

> The common sense behind the rule makes the burden a heavy one. Such accidents simply do not occur in the ordinary course of things unless the vessel has been mismanaged in some way. It is not sufficient for the respondent to produce witnesses who testify that as soon as the danger became apparent everything possible was done to avoid an accident. The question remains, How then did the collision occur? The answer must be either that, in spite of the testimony of the witnesses, what was done was too little or too late or, if not, then the vessel was at fault for being in a position in which an unavoidable collision would occur.

Patterson Oil Terminals v. The Port Covington, 109 F.Supp. 953, 954 (E.D.Pa. 1952).

[3, 4] Where a berthing facility has been damaged, the shipowner may rebut

the presumption of negligence by proving that the wharfinger violated the standard of care to which he is held and that this violation was the proximate cause of the damage claimed. Regarding the wharfinger's duty, we have stated the prevailing view as follows:

> It is well settled that a wharfinger is not the guarantor of the safety of a ship coming to his wharf. He is, however, under a duty to exercise reasonable diligence to furnish a safe berth and to avoid damage to the vessel. This includes the duty to ascertain the condition of the berth, to make it safe or warn the ship of any hidden hazard or deficiency known to the wharfinger or which, in the exercise of reasonable care and inspection, should be known to him and not reasonably known to the shipowner.

Trade Banner Line, Inc. v. Caribbean Steamship Co., S.A., 521 F.2d 229, 230 (5th Cir. 1975). The wharfinger's duty to warn applies only to "any hidden hazard or deficiency . . . not reasonably known to the shipowner". *Id.* Thus, no warning is required "where the alleged obstruction or condition is open and obvious to those in charge of the vessel's management" or where those in control of the vessel have actual knowledge. *General Construction Co. v. Isthmian Lines, Inc.*, 259 F.Supp. 336, 339 (D.Or.1966). *See also Sabine Towing and Transportation Co. v. St. Joe Paper Co.*, 297 F.Supp. 743 (N.D.Fla.1968).

III. THE DISTRICT COURT'S CONCLUSIONS OF LAW

To find Bunge contributorily negligent, the district court evaluated the wharfinger's duty in light of two factors present in the case: (1) The size of the Furness Bridge adversely affected its maneuverability in comparison to smaller vessels and increased its force of impact, and (2) the Bunge docking facility was not adequate for vessels the size of the Furness Bridge. These factors greatly enhanced the chance of a mishap, requiring "extra care" on the part of wharfinger and shipowner alike.

The degree of "extra care" that the district court required of the wharfinger departed significantly from the less stringent traditional standard. Specifically, the district court noted that the wharf owner "knows hazards not fully perceived by the mariner even though the physical objects creating them may be in plain sight". 396 F.Supp. at 856. This superior knowledge led the district court to conclude that Bunge had acted negligently in the following respects:

> It failed to give full caution about the size and structure of the wharf, about the hazards of the unfendered dolphins just a short distance past the line of the wharf, about the need of so large a vessel using four tugs, and it urged berthing at night.
>
> . . . . .

> . . . Bunge, being a subcharterer, knew the precise characteristics of the vessel. Bunge also knew of the current in the river, the layers of river fog, the visibility problems encountered in docking at night, and the exact limitations of its wharf. It failed to take all these factors into account and give the necessary warnings to the master or take other precautions against damage.

396 F.Supp. at 857, 858.

IV. APPLICATION OF THE RELEVANT STANDARD

[5] In the abstract, the district court correctly described the standard of care to which wharfingers are held. If a mariner cannot fully perceive hazards even though the physical objects creating them are in plain sight, then the duty to warn attaches. For example, in *Mediomsley Steam Shipping Co. v. Elizabeth River Terminals*, 354 F.2d 476 (4th Cir. 1966), a shipowner recovered damages from the wharfinger after a defect in a mooring cleat caused the ship to come adrift and go aground. Similarly, in *White Stack Towing Corp. v. Hewitt Oil Co.*, 216 F.2d 776 (4th Cir. 1954), a dock owner was denied recovery against a vessel that had damaged a breasting dolphin in attempting to dock; the Court found that the dolphins had been negligently constructed in that their design was faulty. As we interpret these cases, a wharfinger is required to warn of latent defects because he is the only one

who can avert an accident when the mere visibility of the dangerous physical structure is not sufficient to inform the mariner of a hidden condition.

In the instant case, the damage inflicted was not caused by a defect or dangerous condition solely within Bunge's knowledge and not discoverable by the Furness Bridge.[4] Thus, we conclude that the rule regarding hidden dangers did not come into play. There was nothing about which Bunge should have warned the vessel that the master of the vessel did not already know or that was not solely within the master's navigational responsibilities.

In further explication of our holding, we will examine point by point the omissions cited by the district court as constituting a breach of Bunge's legal duty.

[6] 1. *Failure "to give full caution about the size and structure of the wharf"*: With regard to the structure of the wharf, the district court noted that it was designed to accommodate vessels under a displacement tonnage of 33,750 tons; the Furness Bridge displaced 112,000 tons. Had the vessel collided with the wharf and damaged it or suffered

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4. On cross-examination, the master of the Furness Bridge, Captain Leask, was asked "If there was any condition of that dock that you thought constituted a danger to the ship or to the wharf that was not plainly visible and obvious to you prior to the docking?" The master replied: "No, there was no—nothing I knew about that was there". R. 649.

damage, Bunge might be held negligent for failing to warn about the wharf's structural limitations. Here, however, these limitations were irrelevant to the damage inflicted by the Furness Bridge which, in fact, successfully breasted against the wharf.

[7] Although the size of the wharf was relevant to the vessel's docking maneuvers and, hence, to the damage it caused, this characteristic was obvious—indeed, unmistakable—and required no warning. Photographs in the record and the diagram herein reproduced reveal that the 965-foot vessel was more than twice as long as the 470-foot long wharf. Those in control of the Furness Bridge must be charged as a matter of law with knowledge of the comparative sizes of their vessel and the Bunge wharf. It is further apparent that the master and pilot of the ship were in fact aware of the length of the dock. As the vessel attempted to berth, although at night and with fog forming, "[v]isibility was still good, we could still see the dock quite clearly". (R. 596, testimony of John Shewan Leask, master of the Furness Bridge). The ship's master also testified:

Q: Did anyone mention the length of the dock, by that now I am referring to the concrete dock?

A: I am sure I did know what it was, but I don't specifically remember being told the length of the dock. (R. 644)

Finally, the compulsory pilot responsible for navigating the ship during the berthing in question had docked ships at the Bunge facility 15 to 25 times. (R. 967, testimony of Myron J. Watson).

2. *Failure "to give full caution about . . . . the hazards of the unfendered dolphins just a short distance past the line of the wharf"*: As with the dock, the ship's master and pilot knew or should have known of the presence of at least mooring dolphin No. 1, the one that was struck. The master testified that while he had seen the No. 1 dolphin in the daylight, he had not looked to see if it bore fenders necessary to withstand breasting forces, and had proceeded to dock with little or no concern over whether the vessel landed against the dolphins:

Q: Did you have an opportunity to see these dolphins on the passage from St. Maurice Street wharf to Destrahan?

A: I saw them on the way up to the anchorage, and there was a ship on the berth when we passed and that—that is the only opportunity that I had of seeing the dolphins of the wharf before I went alongside.

Q: Yes, sir. Did you see the dolphins at that time?

A: I saw possibly one, the upriver one, the upstream one, it was clear of the bow of the ship.

Q: That's the dolphin—

A: —the—that's Number 1 dolphin, the one that we have had all the—top dolphin that we use for mooring into when we came alongside.

Q: When you see that [dolphin], you see it's obviously not fitted to come in contact with the side of the ship?

A: I couldn't say that I could state that clearly on the way up the river, no, sir.

Q: You could see it didn't have any fendering around it, couldn't you?

A: Not clearly, no, sir.

Q: Did you see any fendering?

A: No, I didn't see any fendering, and I wouldn't say I was looking for any fendering. (R. 645–46)

• • • • • •

Q: What is your understanding as to the first part of the wharf or the upstream mooring dock on the whole facility that was contacted by the ship?

A: Coming alongside the wharf similar to this one against the current, it's normal to land the vessel forward and then steer in alongside the wharf.

Q: Is that what you were trying to do in this instance?

A: This is what we did in this particular case.

Q: When you say forward, are you talking about the concrete wharf or are you saying—

A: —concrete wharf or the upstream part of the wharf, it would have to be possibly the upstream extremity of the dock, the vessel leans against the upstream part and then comes alongside.

Q: Are you speaking of the dolphins?

A: In this case it would be the dolphins, yes.

Q: You were trying to land on the dolphins?

A: I wasn't trying to land on the dolphins, not directly, but I wasn't too concerned if we did there, to me, it would have been a perfectly normal landing to come in and approach the upstream part of the dock and the vessel swing in and come alongside at a small angle.

Q: So you were not particularly concerned about the bow of the ship striking the upstream mooring dolphin?

A: The vessel didn't strike, we just landed subsequently on the dolphin and then came alongside. I wasn't concerned about the fact this is the way they were doing it. This is perfectly normal procedure, to come alongside at a slight angle and then come alongside of the wharf. (R. 656–57)[8]

[8–13] Given the master's awareness of the presence of mooring dolphin No. 1 and his lack of concern as to whether his mammoth vessel came into contact with it, we conclude that a warning by Bunge was unnecessary and likely would have

8. The testimony of the compulsory pilot is less clear on this point but does suggest a lack of concern over whether any mooring dolphins were struck. Although he denied that he was trying to come into contact with dolphin No. 1, the pilot stated, "I was just trying to get the ship alongside the dock, I mean the dock or any portion of the dock, I mean just trying to land—land the ship". (R. 955)

been in any case a futile gesture. Bunge, the dock owner, had no duty to supervise the Furness Bridge's docking procedure, absent, perhaps, a hidden defect in the docking facilities. Rather, the master, an expert mariner, is responsible for the docking of his ship.[6] Cf.

6. During the docking in question, the vessel was being navigated by a compulsory pilot as required by LSA-R.S. 34:1041 *et seq.* "The authority of the master of a vessel is not in complete abeyance," however, "while a pilot, who is required by law to be accepted, is in discharge of his functions". *Jure v. United Fruit Co.*, 6 F.2d 6 (5th Cir. 1925). *Cf. Chesapeake Bay Bridge and Tunnel District v. Lauritsen*, 404 F.2d 1001, 1007 (4th Cir. 1968). In fact, our conclusion as to the respective duties of the parties is strengthened by the presence of the compulsory pilot who must be held to an unusually high standard of care because he "is selected for his personal knowledge of the topography through which he steers his vessel . . . He must . . . be familiar with all dangers that are permanently located in the course of the river . . . All this he must know and remember and avoid". *Atlee v. The Nw. Union Packet Co.*, 88 U.S. (21 Wall.) 389, 398, 22 L.Ed. 619, 621 (1875). *See also Petition of M/V Elaine Jones*, 480 F.2d 11 (5th Cir. 1973), *modified at* 513 F.2d 911 (5th Cir. 1975). "[S]uch skillfulness requires a high degree of knowledge predicated on special training and inquiry, and not casual competence". *Essex County Electric Co. v. Motor Ship Godafoss*, 129 F.Supp. 657, 660 (D.Mass.1955). Thus, absent a finding of actual knowledge, the pilot may be charged with knowledge of a local condition as a matter of law. *See General Construction Co. v. Isthmian Lines, Inc.*, 250 F.Supp. 336, 339 (D.Or.1966). In the instant case, the compulsory pilot was charged with constructive, if not actual, knowledge of the mooring dolphins and the risk they presented. *Cf. Standard Dredging Corp. v. S/S Syra*, 290 F.Supp. 260 (D.Md.1968).

Trade Banner Inc., supra, 521 F.2d at 281. Here, the master must be charged with the natural, foreseeable consequences of his docking maneuver. As the district court noted, "[e]lementary geometry demonstrates that a vessel twice the size of the wharf may strike one of the dolphins if it approaches at an angle of 3 degrees". 396 F.Supp. at 855. Under these circumstances, the duty of care lay solely with the Furness Bridge:

> The striking of a fixed object on the dock by a moving steamer constitutes damage not ordinarily done by a boat under control and carefully managed, and is prima facie evidence of negligence. Plaintiff was not bound to assume possible negligence on the part of the Bradley, *nor was it bound to take any action with reference to a navigation operation which was wholly within defendant's control.* [emphasis added; citations omitted]

Ford Motor Co. v. Bradley Transportation Co., 174 F.2d 192, 196 (6th Cir. 1949).

3. *Failure "to give full caution . . . about the need of so large a vessel using four tugs:"* We have found no evidence in the record establishing that a safe docking could not have been accomplished with three tugs instead of four. As it happened, the Furness Bridge attempted to dock on the night of January 15, 1974, using three tugs and collided with a mooring dolphin; the following night it docked safely with four tugs. Earlier, however, it had docked without incident at New Orleans using only three

tugs. The district court did not indicate how Bunge could have known that four tugs were necessary[7] and, in fact, held the captain of the Furness Bridge negligent on this point: "While three tugs might have been adequate, four would, he knew from his own experience, have been better; he chose to save cost".[8] 396 F.Supp. at 858.

7. The district court did state that "Bunge, being a subcharterer, knew the precise characteristics of the vessel". 396 F.Supp. at 853. While the voyage charter party recited the bare dimensions and weight of the ship, Defendant's Exhibit No. 6, it did not indicate anything as to its maneuverability. The characteristics with which Bunge was familiar were not sufficient to enable it to judge the number of tugs needed in berthing.

8. Captain Leask testified as follows:

> Q: You thought three was adequate?
> A: Three was adequate, that's right, sir.
> Q: And this was a decision you made?
> A: Yes, sir, I did, and the pilot agreed that this was adequate.
> Q: You talked this over with the pilot at St. Maurice Street?
> A: Yes, on the original docking I did talk this over with the pilot going into St. Maurice Street.
> Q: Did you discuss this with Captain Watson prior to the docking?
> A: Yes, when Captain Watson came on board they already arranged for three tugs by this time.
> Q: And you all were unanimous that three would be enough?
> A: Yes, we were. (R. 651)

If all the navigational experts involved in docking the Furness Bridge agreed that three tugs would be sufficient, we cannot agree that Bunge, not an expert, was negligent in failing to suggest four.

[14–16] Under these circumstances we refuse to impose upon a wharfinger the duty of assessing the number of tugs needed by a particular vessel in docking. Use of tugs is an integral part of docking procedure and as such is a navigational operation for which the ship's master has exclusive responsibility. *See A/S Atlantica v. Moran Towing & Transportation Co., Inc.*, 498 F.2d 158, 161 (2d Cir. 1974); *Al Johnson Construction Co. v. S.S. Rio Orinoco*, 249 F.Supp. 182, 187 (E.D.Pa.1965). Bunge never attempted to assert control over this aspect of the Furness Bridge's navigation. As the district court noted, the vessel "was under the exclusive custody and control of employees of Furness Withy". 396 F.Supp. at 855. This finding is not altered by the fact that the vessel was voyage subchartered to Bunge by the original time charterer, Seabridge:

> Under a voyage charter, the shipowner retains full control over the navigation and operation of the vessel . . . . The owner assumes the risks of insufficient speed, excessive fuel consumption, and all perils of navigation.[9]

In short, the master, and not the wharfinger, "was in charge of the operation and navigation of the vessel at all times and it was his duty to exercise a high degree of care in accordance with the skill necessary in the control and management of a modern oceangoing tankship to avoid injury to" the docking facility. *Esso Standard Oil, S.A. v. The S.S. Sabrina*, 154 F.Supp. 720, 724 (D.Canal Zone 1957).

9. Trowbridge, *The History, Development, and Characteristics of the Charter Concept*, 49 Tul. L.Rev. 743, 753 (1975).

[17] 4. *Bunge "urged berthing at night" and failed to warn about "the layers of river fog" and "the visibility problems encountered in docking at night":* Bunge cannot be held negligent for urging the Furness Bridge to dock at night. Responsibility for that decision must rest with the master, and the record is clear that Captain Leask voluntarily decided to berth in darkness although his preference was to wait for daylight. R. 581, 850–51; Defendant's Exhibit No. 10. The district court hinted at coercion by Bunge when it found that Bunge threatened to take the Furness Bridge "off hire" until it proceeded and was ready to berth at night. 396 F.Supp. at 855. The district court apparently based this finding of fact on the testimony of Captai.. Leask, who used the words "off hire". R. 581–82, 687. However, since the Furness Bridge was not under a time charter to Bunge, we doubt that Bunge had the power to take the vessel "off hire".[10] It is likely more precise to say that Bunge told the master that the vessel would not be paid lay time for the period during which it refused to berth.[11] According to Bunge's voyage subcharter, "[n]otification of the vessel's readiness to discharge must be delivered . . .

10. "Most, if not all, time charters provide that the charterer does not have to pay hire in specific situations whereby time is lost because of failure of the vessel to render service. Such clauses are described as 'off-hire' ". O'Brien, *Freight and Charter Hire*, 49 Tul.L. Rev. 956, 965 (1975).

11. An agent of Bunge informed Captain Leask that "laytime on subject [vessel] ceases . . at 1430 1/15/74 when [vessel] ordered to berth". Defendant's Exhibit No. 10.

before 4 p. m. . . . and the laydays will then commence at 7 a. m. on the next business day whether in berth or not". Defendant's Exhibit No. 6. As Bunge points out in its brief, "it is difficult to understand how a ship can be ready to load while refusing to come to berth". Brief for Appellant at 6 n. 26. Thus, Bunge's refusal to pay lay time while the vessel refused to berth appears to have been no more than an assertion of its contractual rights and cannot be viewed as a form of coercion sufficient to impose liability for negligence.

[18, 19] Nor can we hold Bunge to a greater standard of care because the vessel, for whatever reason, docked at night in dense fog. Captain Leask testified that from his and the pilot's position on the ship's bridge, "even without the fog, I doubt . . . we would have been able to actually have seen the dolphin due to the height of the vessel and the position of the dolphin". R. 681. (See diagram). Moreover, the vessel's negligence is not measured with reference only to what was actually visible to the master or pilot:

> It is a primary rule of navigation that all moving vessels shall maintain a careful and efficient lookout. The lookout is "both eyes and ears of the ship"; he must be properly stationed on the forward part of the vessel and must be held to a high degree of vigilance in that position. Neither the captain nor the helmsman in the pilot house can be considered to be "lookouts" within the meaning of the maritime law.

Dahlmer v. Bay State Dredging & Contracting Co., 26 F.2d 603 (1st Cir. 1928). If the master continues to navigate his vessel knowing that dense smoke or fog will "prevent his lookouts from keeping an adequate watch", then he will be held liable for any resulting damage caused by his vessel. *Ford Motor Co., supra*, 174 F.2d at 195.

Here there is no suggestion that the darkness or fog prevented lookouts on the ship's bow from seeing the mooring dolphin. The compulsory harbor pilot testified as follows:

> And I knew I was coming in slowly at this time. So the next thing I knew, some—the mate yelled back to the captain that the catwalk had fell into the river . . . and that's the only information I have about coming into contact with the dock at all. (R. 951)

Captain Leask was more specific:

> Q: . . . did you get any reports from the bow as to the position of the vessel during this time?
>
> A: We got a report that the ship was approximately 15 feet off the wharf, and then next we got a report that there was something wrong up forward. (R. 590–91)

This testimony makes clear that no message of the impending collision was ever relayed. The lookouts on the bow thus failed to exert the "high degree of vigilance" required of them. They were in a position to warn the master about the proximity of the mooring dolphin but failed to do so, thereby violating their legal duty. We repeat that this was an aspect of the vessel's navigation for which the wharfinger cannot be held responsible.

The district court's observation that the legal concepts governing the relationship between ships and wharves "must be adjusted to meet the new technology of vessel construction", 396 F.Supp. at 856, may prove in the long run to be accurate. We attempt no such forecast. We rest on the conclusion that this is not the day, and this is not the case, for such adjustment to be undertaken. We adhere instead to the time-honored premise that as between a visible, stationary structure and a moving vessel under the navigation of an expert mariner, the latter is in the superior position to avoid calamity.

V. THE SAFE BERTH CLAUSE

The Furness Bridge has cross-appealed on the issue of whether Bunge was under a contractual duty to provide a completely safe berth. The district court did not expressly decide this issue, but did discuss it in the following terms:

> Much has been made in briefs about whether, since Bunge subchartered the vessel under a charter party containing a safe berth clause, it had a contractual obligation to provide a secure berth. The clause is in customary terms; it obliges the vessel to discharge cargo "at any wharf or place that Charterers or their Agents may direct, provided the vessel can safely be always afloat at any time or tide." Furness Withy argues that the clause implies a duty by the charterer to furnish a safe berth and imposes liability for its failure to do so, and that Bunge is obligated to Furness Withy by it

because the charter to Seabridge contained the same clause. Bunge not only disputes this interpretation of the contract; it contends that, whatever its contractual obligation, the duty was due only to Seabridge; it had no contract with Furness Withy.

At least on its face the safe berth [clause] appears merely to exonerate the owner from any duty to berth the vessel at a place its master deems unsafe. There are authorities that read the clause more broadly, and find that it implies a contractual duty to provide a completely safe berth. See, e. g., *Venore Transportation Co. v. Oswego Shipping Corp.*, 2d Cir. 1974, 498 F.2d 469; *Paragon Oil Co. v. Republic Tankers, S.A.*, 2d Cir. 1962, 310 F.2d 169; *Park S.S. Co. v. Cities Service Oil Co.*, 2d Cir. 1951, 188 F.2d 804; *Athina Shipping Co. v. Amerada Hess Corp.*, M.D.Fla.1971, 1972 AMC 796; *Universal Tramp Shipping Co. v. Irish Salt Mining Co.*, D.Mass.1970, 1970 AMC 1783; *Red Star Barge Line, Inc. v. Lizza Asphalt Construction Co.*, E.D.N.Y.1959, 164 F.Supp. 97, aff'd. 2d Cir. 1959, 264 F.2d 467. But some at least take the view that the clause means merely what it says and does not operate to shift to the wharfinger liability that would otherwise attach to the vessel. See Gilmore & Black, The Law of Admiralty § 4–4 at 204 (2d ed. 1975).

Under the circumstances of this case these authorities appear not to be controlling. But what is important is that Bunge, being a subcharterer, knew the precise characteristics of the vessel. Bunge also knew of the current in the river, the layers of river fog, the visibility problems encountered in docking at night, and the exact limitations of its wharf. It failed to take all of these factors into account and give the necessary warnings to the master or take other precautions against damage. It has violated a legal duty whether or not it also had a contractual one.

396 F.Supp. at 857–58.

As we interpret this language, the district court held that the issue of contractual liability was irrelevant in view of its disposition of the case. We affirm the holding, but of course upon a different basis.

[20, 21] The parties have cited no case in which this Court has interpreted the customary safe berth clause. The instant case does not afford us the opportunity to hold in favor of either the modern or the traditional view, for we are certain, in the circumstances here present, that the parties could not have intended the safe berth clause, whether by charter party or upon a third party beneficiary theory, to warrant the complete safety of the Bunge wharf. The facility, as it existed at the time when both charter parties were entered into, "was not adequate for vessels the size of the Furness Bridge". 396 F.Supp. at 857. It was "unsafe" only in that it was

too small for this vessel. Surely none of the parties who might be bound by or claim protection under the safe berth clause intended that Bunge would either rebuild its entire facility or accept absolute liability by virtue of a boilerplate provision. Under the circumstances, we conclude that there is no contractual liability because of an exception to the safe berth warranty: "When a charter names a port and the master proceeds there without protest, the owner accepts the port as a safe port, and is bound to the conditions that exist there". *Pan Cargo Shipping Corp. v. United States*, 234 F.Supp. 623, 638 (S.D.N.Y.1964). See also Smith, Jr., *Time and Voyage Charters: Safe Port/Safe Berth*, 49 Tul.L. Rev. 861, 869–70 (1975).

VI. CONCLUSION

We see no reason to disturb the traditional standard of care to which the wharfinger is held. Whether it be tugs or tankers that come to berth at his dock, the wharfinger remains in the same position in terms of his ability to protect his structure. Those in control of the vessel's navigation must bear the greater responsibility for bringing their ship safely into and out of port. The dock owner's liability should extend only so far as the vessel's master could not have averted an accident, such as where a hidden hazard is or reasonably should be known to the wharfinger and cannot be known to the master in the exercise of ordinary care.

[22] In this case, a wharf structurally sound for most ships was deficient for the Furness Bridge, a super tanker. The "defect" was obvious and need not have been the subject of a warning by Bunge. The vessel was under a duty to approach the dock "with reasonable skill and care to avoid injuring it, *having in view the difficulties and perils including those caused by the [dock] itself*". *Sabine Towing & Transportation Co., supra*, 297 F.Supp. at 751. (emphasis added). The master and pilot of the Furness Bridge knew that their ship was much longer than the Bunge dock, and knew or should have known that unfendered mooring dolphins lay ahead of the dock, and that special care would be necessary to avoid damage while berthing at this facility. When the vessel commenced its docking maneuver insensitive to these special needs of the situation, and struck a mooring dolphin causing great damage, a classic prima facie case of negligence arose. The vessel failed to produce evidence negating the presumption of negligence or demonstrating contributory negligence by Bunge. Under these circumstances, the vessel was solely liable and damages should not have been divided, but should have been imposed only upon the Furness Bridge and her owner.

We have considered the Furness Bridge's claim that Bunge was solely liable by virtue of a contractually assumed duty. We conclude that, regardless of whether the time or voyage charter created an obligation on Bunge's part to-

ward the vessel, the parties did not intend the safe berth clause to shift liability for the pre-existing condition of the wharf.

The judgment appealed from is REVERSED and REMANDED as to the main appeal and AFFIRMED as to the cross-appeal.

APPENDIX C

JUDGMENT OF UNITED STATES COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75 - 2695

D. C. Docket No. CA 74-1656 "C"

BUNGE CORPORATION,
Plaintiff-Appellant - Cross-Appellee

v.

M/V FURNESS BRIDGE, her engines, tackle, apparel, etc., in rem,
Defendant

Furness Withy & Co., Ltd., in personam,
Defendant-Appellee - Cross-Appellant

Appeals from the United States District Court for the Eastern District of Louisiana

Before GEWIN, AINSWORTH and SIMPSON, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern

District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed and remanded to the said District Court in accordance with the opinion of this Court as to the main appeal; affirmed as to the cross-appeal;

It is further ordered that defendant-appellee cross-appellant pay to plaintiff-appellant cross-appellee, the costs on appeal to be taxed by the Clerk of this Court.

September 2, 1977

Issued as Mandate: Oct. 28, 1977

APPENDIX D

ORDER DENYING PETITION FOR REHEARING

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Filed: Oct. 20, 1977

NO. 75 - 2695

BUNGE CORPORATION,
Plaintiff-Appellant Cross-Appellee

versus

M/V FURNESS BRIDGE, her engines, tackle, appeal, etc., *in rem*,
Defendant

FURNESS WITHY & CO., LTD., in personam,
Defendant-Appellee Cross-Appellant

Appeal from the United States District Court for the
EASTERN DISTRICT OF LOUISIANA

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion 9/2/77, 5 Cir., 197_ , _____ F.2d_____).

(October 20, 1977)

Before GEWIN, AINSWORTH and SIMPSON, Circuit Judges

PER CURIAM:

(x) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

S/ Robert Ainsworth, Jr.
United States Circuit Judge

APPENDIX E

RULE 52

Rule 52.
FINDINGS BY THE COURT

(a) **Effect.** In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

(b) **Amendment.** Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to

support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment.

As amended Dec. 27, 1946, eff. March 19, 1948; Jan. 21, 1963, eff. July 1, 1963.

APPENDIX F

FRODE RINGDAL

Some liability aspects of navigation and berthing of very large tankers

ARKIV for SJØRETT

Særtrykk av bind 12 - hefte 2 - 1973

A-52

ARKIV FOR SJØRETT

utgis av

Den norske sjøretts-forening,
Avdeling av *Comité Maritime International*,
med støtte av
A/S Norsk Varekrigsforsikrings Fond
til fremme av norsk sjørett og sjørettsforskning
og Anders Jahres Fond til vitenskapens fremme.

Redaktør: professor dr. jur. *Thor Falkanger*,
Nordisk Institutt for Sjørett.
Universitetet i Oslo.

Redaksjonssekretær: advokat *Ivar Kleiven*,
Sjoassurandørernes Centralforening, Oslo.

I kommisjon hos:

UNIVERSITETSFORLAGET

Universitetet, postboks 307, Blindern, Oslo 3.

A.s Joh. Nordahls Trykkeri, Oslo

A-53

SOME LIABILITY ASPECTS OF NAVIGATION AND BERTHING OF VERY LARGE TANKERS[1]

By høyesterettsadvokat *Frode Ringdal*, Oslo

I. LEGAL PROBLEMS CREATED BY THE TECHNOLOGICAL DEVELOPMENT

The fact that larger vessels require more space and time for turning and stopping than smaller vessels may seem self evident. But some readers may be really surprised to learn which figures are relevant to-day in respect of times and distances.

A 'crash stop' for a turbine tanker of 220,000 tons dw., requires 22 minutes from full ahead 16 knots to stop in the water with engines full astern. To change the propeller to astern movement, requires 1¾ minutes. The stopping distance is almost 5,000 metres = 2,5 nautical miles.

'Coasting stop' for such a vessel, which means reducing speed from 16 knots to 2 knots with engines stopped, requires 48 minutes and a distance of 11,000 metres = 6 nautical miles.

To alter course 45 degrees with the helm all over at full speed, requires almost 2 minutes, and the vessel will have covered a distance of 900 metres = ½ nautical mile before the course has actually been altered that much. The vessel will have covered almost the same distance before the hull has completely departed from the original course line, even if the alteration of heading starts immediately.

It is revealing to consider what these data imply when such a large vessel enters the Oslo fiord and proceeds towards Esso's Slagen Refinery a dark winter night — or when a similar vessel suddenly encounters fog in the heavily trafficked English Channel en route to Europort.

[1] The article is based on a lecture given at the 5th Scandinavian Maritime Law Seminar in Sandefjord the 12th October, 1972.

The large vessels with huge displacement in movement naturally represent a greater hazard and have a greater capacity to cause damage than the small vessels, and this capacity has vastly increased over the last few years. The kinetic energy of a vessel increases proportionally with its displacement multiplied by the square of the speed. A fully laden 220,000 ton vessel making a speed of 2 knots will actually have the same kinetic energy as a fully laden 10,000 tonner proceeding at 9 knots.

The rather shocking limitations of the manoeuvring ability of the large vessels, and the hazards which the figures illustrate, also entail some legal aspects. The application of the Rules of the Road in respect of giving way and of keeping moderate speed in fog readily comes to mind. How can such a vessel meet the traditional criteria for moderate speed in fog, such as stopping in one half of the visible distance? Should a higher speed be accepted as moderate speed in fog for a larger vessel than for a smaller one, depending on her manoeuvring ability? Should not rather the reverse conclusion be drawn, considering the hazards and damaging capacity of the larger vessel? How is the mammoth vessel able to meet her give way duty to small fishing craft that suddenly cross the fairway in narrow waters? Perhaps new rules are called for, obligating the small and more easily manoeuvreable vessels to give way for the large ones? What about the narrow water rule — should a water be considered narrow for the largest vessel but not for the smallest one? Should not rather the same rules apply to both of them when David and Goliath meet?

These are only a few of numerous questions arising from modern development of ships' sizes, and the answers will in any event have considerable economic consequences.[2]

A committee of experts appointed by the Norwegian Directorate of Shipping for the purpose of analysing the shipping traffic in the Oslo fiord, proposed in their report of July 1972, the introduction of certain signals for larger vessels 'which are unable to follow the Rules of the Road'. Such a statement made by a public committee is rather sensational, and illustrates the need for more radical reforms of the rules than those now adopted by IMCO. Until such more fundamental reforms can be implemented, it is to be expected that the largest and less manoeuvreable

[2] Some of the problems were considered by the IMCO Conference revising the Rules of the Road in the autumn of 1972, but the new Rules adopted on the 20th October, 1972, and expected to take effect on the 1st January, 1976, have not solved the more fundamental problems.

vessels will be the losers when liabilities are to be apportioned following an accident, and the standards of care will probably be defined so strictly that the practical result will be an almost absolute liability.

It seems natural to pose the question:

Has the technical development brought new liability aspects into focus, or are we only faced with enlarged variations in a well-known pattern? Has for instance the risk element grown to such proportions that we must test and reconsider the old dogma and liability models? I submit that we must, and I feel that in attempting to reconcile the technological reality of modern times with our more traditional and rigid legal constructions, a maritime lawyer may easily be shaken in his faith in some of the legal fundamentals of his youth.

II. THE BERTHING PROBLEMS — SOM STARTING POINTS

This paper will limit itself to problems connected with berthing of the largest vessels. The other interesting problems of navigation and corresponding liabilities created by the continual increase in vessels' size, must be left out.

Whereas in recent years the number of ships collisions involving Norwegian vessels represents between five and ten per cent of the total number of mishaps reported to the Norwegian hull underwriters, the number of strikings against fixed objects represents 20—25 per cent of the total. In monetary terms the damages caused by striking are equally serious. The damage to a berthing structure may easily reach the sum of about $ 1,000,000, and larger tankers have become total losses as a result, creating financial losses to their owners and underwriters in the region of $ 7—8 millions. Thus, berthing damage can lead to enormous losses.

The most significant feature in the development of the berthing procedure in the last decade, is that the role of the Master has been diminished — he has been degraded from his position as autocratic ruler in some navigational matters. As in aviation and in railroad operations, computers and terminal operators ashore have taken command — exact calculations have replaced the nautical instinct of the navigator.

The new feature and an absolute requirement for the successful berthing of a large vessel, is the transfer of decision making from ship to shore. The real ruler in questions of berthing procedure is now the berthing master ashore. The Esso organization in parti-

cular has done extensive research and studies in the field, and at their Slagen Refinery in Norway has developed a very advanced procedure for berthing. An important element of that procedure is a most extensive cooperation between the ship's master, pilot, tugs and the shorebased berthing master. Located at the berthing installation are advanced instruments for gaugeing the force and direction of wind and current, as well as the vessel's approach speed at any given time. Precise tolerances have been established in respect of allowable approach speed and angle for each ship berthing. Thus, a vessel of 250,000 tons dw. may not dock at an angle exceeding 5 degrees to the berthing structure, and the speed must not exceed 17 feet per minute corresponding to 0.17 knots.

The introduction of this ship — shore teamwork in berthing, must clearly have legal aspects. A fair conclusion would seem to be that if something goes wrong as a result of navigational errors ashore, the shoreside should be liable when damage is caused. On the other hand, would it not be a reasonable proposition that the vessel should be exempt from liability for damage to shore installations resulting from navigational errors committed ashore? I submit that the technical development calls for a shifting of some liability from ship to shore.

Where compensation is claimed in respect of damage to shore installations, the traditional doctrine has considered the vessel's liability for nautical errors, or in some instances her strict liability for technical break-down of equipment on board. Where the vessel has suffered damage, discussions of liability have usually centered around the doctrine of the charterer's liability for 'safe berth'. These different legal approaches result from considerations of who is the tort-feasor and who has suffered damage. It is a fact, however, that the more unkind contact between ship and shore objects usually causes damage to both. It is unpredictable and coincidental who will damage whom. As far as establishment of the liability criteria is concerned, it should be irrelevant who suffers what. The criteria should be the same for each tort-feasor. The deciding element — or at least the starting point for the discussion, should be: where is the proximate cause of the accident to be found, on board or ashore?

The analysis to follow will initially — in a vague and unsophisticated manner — weigh the liability of the 'shore side' as against that of the 'ship'. Subsequently, the interested persons and parties involved on each side will be introduced. A discussion will follow on the respective liabilities for erroneous acts of the various parti-

cipants. As we proceed, the question will be raised whether liability should be based on contract or on tort, and whether it should be strict or based on negligence in the various circumstances. To start with we accept the proposition that the two parties 'ship' and 'shore' must assume liability for their own negligent acts and those of their servants. On that assumption the major task will be to apportion between them the various functions and obligations to be performed and met in connection with the berthing of the vessel. The party failing to meet the obligation placed on him, will subject himself to liability. The party who has done what is expected of him, will go free.

Negligence by the vessel in berthing invariably involves approach speed and angle. Traditionally the vessel encounters an almost insurmountable handicap: When the mishap occurred the berth was at rest — the vessel was in motion. In the U.S.A., this simple fact has lead to a legal presumption of negligence against the vessel[3], but that does not really solve all problems. In order to determine whether this large tanker should be charged with excessive speed or with wrong angle of approach, it is necessary — through information from the shore installation — to establish which speed and angle would be proper for this particular vessel in her particular situation. Consequently, it is necessary to analyse the relevant factors and the potential liabilities ashore before the relevant factors on board are considered.

III. SHORE SIDE FACTORS AFFECTING BERTHING PROCEDURE

In order that a tanker may berth with a minimum risk of damage to ship and shore installations, at least four criteria must be met:

1. The berth must have a sufficiently solid construction, and must be adequately dimensioned for receiving the large vessel under defined approach conditions.

2. The berth must not have defects, weaknesses or previous damages which render the applicable berthing criteria untenable.

3. The berthing instructions and procedures for the particular vessel established on the basis of the shock absorbing ability of the berth structure, must have been clearly and correctly defined, and the vessel must have been properly notified about the relevant factors.

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[3] *Sealand Dock & Terminal* v. *Zion* 1962 AMC 391 SDNY, *The Allied Chemical Comp.* v. *Edmundson Towing Co.* 1971 AMC 1570 EDLa.

4. The vessel must receive the necessary assistance and co-operation from shore to enable her to meet the berthing requirements.

Re No. 1. In the age of the giant tankers, the strength of the berthing structure has become increasingly important. The smaller vessels dominating in the past had a relatively small kinetic energy. By and large the berthing structures were overdimensioned, and concrete ashore normally won over steel at sea. That situation has changed.

The relative strength between ship and berth has changed. Whereas the damage-causing capacity of the vessels has increased rapidly the strength of the berthing structures has not been increased sufficiently to absorbe the increase in kinetic energy. The foremost problem at present in berthing the large tankers, is to avoid exceeding the maximum stresses which the shore facilities have been built to with stand. Each terminal operator must to-day know exactly what impact the terminal can absorb, measured in ton/metre totally and in each separate point of impact. If the vessels are unable to berth in the normal manner without exceeding the stress limits, the berthing structure is inadequate, and the vessel should not be invited to berth.

Naturally, the courts in most countries have established the requirement that the berth must be adequately dimensioned to be able to receive the vessels in question. A recent Norwegian Court of Appeals decision has been reported in ND 1967. 111 Hålogaland the 'Salangen'. In that case the quay collapsed because it was not strong enough for receiving the vessel in a normal manner. The vessel was exonerated from liability for the resulting damage.

Re No. 2. It is equally well established that a berthing installation should not have defects which may lead to damage. In the case of the 'Deneb', ND 1951.561 Hålogaland, an iron bar protruded the fendering system of the quay and damaged the docking vessel. The quay owner was held liable for the damage.

Difficult problems arise in respect of a berthing structure that has lost some of the initial strength with which it was originally designed. Through repeated exposures towards its resistance limits, a structure may become weakened. A slight impact which in the past hardly would have been noticeable, now results in the structure's total collapse. In theory the solution is clear — reductions in strength and shock absorbing ability of the structure must be

taken into account by the shore side before berthing each vessel. The approaching ship has no possibility of knowing about such defects. But weaknesses of such a nature may not be visible, and inherent defects may be difficult to discover and measure even for the terminal operator. In practical life, proof of such contributing cause may often be impossible to establish.

An illustration is offered by the Hallcrow fendering beam. That beam was a one piece concrete fence along the entire quay front of tanker terminals built in the Far East in the nineteen fifties. Its lifetime under certain stresses was calculated to be 30 years. Most of the beams collapsed after 10 years and on each occasion the actual stress was below the established limits. Norwegian vessels were involved in two of these incidents which were identical: An Oslo tanker destroyed one fender in Singapore in 1968, and a Kristiansand tanker destroyed another fender at another installation in Singapore in 1970. Both fendering beams had developed small cracks successively at the same distance from the quay corners. On certain occasions, the cracks developed further and they had been repaired by filling in cement. No claims were presented against the vessels causing the expansion of the cracks. But the last ship, which caused the deadly blow and collapse, was held fully liable. At first the vessels had difficulties in establishing a defence. In the first case the vessel finally obtained a compromise settlement by paying two thirds of the provable damage. However, in the second case the experience gained gave the vessel an improved position and the claim was settled at 50 pct.

The conclusion to be drawn from the two cases must be that if a vessel has followed a procedure resulting in a stress impact within the tolerances given, she should not have to assume liability for damages caused in such berthing.

Re No. 3. It might seem natural that if the approaching vessel has been given relevant data from shore about the shock absorbing capacity of the berthing structure it would be up to the vessel to see to it that that capacity is not exceeded. But the vessel cannot very easily determine under which conditions and in which manner a soft landing within the tolerances is possible. When the margins are so small that a large vessel for instance at the Slagen Refinery must approach the berth at an angle of less than 5 degrees and with a speed not exceeding 17 feet per minute=0.7 knots if she is to avoid causing damage, I submit that only the shore side can determine whether a particular vessel under existing circum-

stances can berth safely, how that is possible and how in details it has to be done.

Based on the available data on the design-features and shock absorbing capacity of the berth, the shore side must prescribe the maximum speed and approach angle for the vessel. The making of such a prescription will require a scientific method and the use of a computor in co-operation with technical experts including the designer of the structure and — of course — technical details about the vessel. The necessary calculations cannot be made by the ship's master, who, apart from not being an expert in the field, does not possess the necessary technical information.

This situation calls for a departure from the conventional views of the shore side's duty to give information to the vessel. A much more active participation by the shore side is required: it must give instructions of a nautical nature.

Re No. 4. But even that will not suffice. The vessel will need assistance from shore in order to be able to berth at the prescribed approach speed and angle. The successful docking presupposes knowledge not only of the manoeuvring characteristics of the vessel; more particularly, detailed information is needed on the direction and force of wind and current, and continuous information on approach speed and distances and the presence of tug boats and other aids to navigation is essential. Some elaboration must be made in this respect.

a. Several legal authors and court decisions have described and dealt with the shore side duty to render information to the ships about berthing conditions. The prevailing Scandinavian doctrine is roughly that the shore side is obliged to advise the ship only about such conditions and berthing hazards as the ship herself is unable to ascertain.[4]

In English law, however, the *Moorcock* decision of 1889 has been considered leading for the proposition that a quay owner inviting a vessel to use his quay, must exercise due diligence to ascertain that the ship can berth safely without suffering damage.[5]

I submit that these requirements should be raised: When directing larger vessels to a quay which even under a normal berthing will be exposed to maximum stress, the shore side as well as the

[4] *Ramberg:* Unsafe Ports and Berths, AfS 8 (1967) p. 635 with references quoted therein.

[5] *Ramberg:* Op. cit. p. 636.

charterer should accept an absolute and unconditional duty to ascertain precisely the stress margins of the structure, and to apply the available data to the particular vessel and the existing circumstances in order to determine whether or not the vessel can safely berth. The conclusions should be reported to the vessel. Failure to do that, or errors committed in the process, resulting in damage, should entail liability for the shore side and exoneration of liability on the part of the vessel.

b. As regards the right of the shore side to give the vessel orders concerning speed and approach angle, the position de lege lata is a bit problematic. As has already been pointed out, the conventional vessel has no possibility of determining speeds not exceeding 0.2 knots or approach angles not exceeding 5 degrees. But, as will be appreciated, it is essential to make exact measurements in these respects, and a determination of such micro-tolerances at sight is impossible. In consequence, the shore side must give guidance and instructions to the vessel. However, the shore side has traditionally been unwilling to accept any such duty. It is also noteworthy that the available decisions and legal comments on the topic are rather old, and concern matters as they were before the age of the very large tankers. In consequence they are no longer directly applicable. In the view of the author, time has now come to establish an absolute duty on the part of the shore side to give such instructions about speed and angles which are necessary prerequisites for having the particular vessel berth at the particular installation. Where such instructions are not available, the shore side should face the consequences.

IV. THE SHIP'S DUTY TO FOLLOW INSTRUCTIONS FROM SHORE

The duty of giving necessary instructions to the vessel is significant not only for the safety of the vessel, but also for the safety of the shore structure. Thus, the necessary supplement to the duty of the shore side is the duty of the vessel to follow the instructions. Nevertheless it may be tempting to ask whether the instructions should be considered as mere advice to the vessel, to be followed or disregarded at will, or whether the instructions should be considered a binding order, resulting in liability for the vessel if disregarded. This, in the end, leads to a determination of who shall have the ultimate command and bear the major responsibility for berthing, the ship or the shore side.

No authority need be quoted in support of the proposition that

public authorities have the right to give orders and directions to vessels in respect of speed and navigation in harbours and in berthing. There will always be binding rules and regulations granting the necessary powers to the authorities. All vessels are bound to follow the instructions thus given, and failure to comply will have legal consequences. But it should be equally clear that quay owners or terminal operators have the right to give binding instructions to berthing vessels in respect of approaching speed, angle, moorings, etc. Docking at a private terminal is contingent upon consent from the terminal owner, and the consent can be made conditional.

Should the vessel consider the berthing instructions overly cautious and deliberately disregard them with some damage resulting, the vessel will no doubt be held liable by all courts for losses caused thereby. On the other hand, if the vessel complies strictly with the instructions in spite of the master's disagreement with their justification, and the compliance results in damage, I submit that the vessel should not be held liable for the damage. There are various Scandinavian court precedents for the proposition that the vessel has an absolute duty not to violate instructions in respect of speed and approach angle, irrespective of whether or not the master considers them foolish. There are, for instance, court decisions condemning speed exceeding the maximum prescribed for harbour basins.[6] But if a master considers the prescribed maximum speed to be too high or the angle to be too wide, he is of course free to choose a more cautious approach.

The conclusion to be drawn is that when the shore side has determined tolerances in respect of maximum stresses for berthing structures, the maximum size of vessels permitted to berth and directions and procedure for berthing, it must also carry the risk for the adequacy and correctness of its requirements.

V. THE SHORE SIDE'S DUTY TO RENDER ACTIVE MANOEUVRING ASSISTANCE IN BERTHING

We now come to the important question of how the vessel can manage to comply with the shore side's berthing instructions. A 'soft landing' of a large tanker is an undertaking which requires an intimate and detailed co-operation between ship and shore.

[6] See the Danish decision 'Nevada' ND 1956.275.

Such co-operation must extend beyond the fields which have been discussed above. There are two aspects of the matter. One is the possible duty of the shore side to make personnel, equipment and instruments of a certain standard available for assisting the vessel. The other is whether such duty has been fulfilled when persons, equipment and data have been made available, or whether the shore side shall also be responsible for their proper functioning and be liable for errors committed. Suffice it to say here that the shoreside should have the duty to render assistance as mentioned, and should be liable if the assistance fails or results in damage. Some examples will illustrate the points.

A tanker from Bergen, Norway, of about 50,000 tons gross and 95,000 tons deadweight approached a discharging installation in Japan at a wrong angle and excessive speed some four years ago. She struck a dolphin and damaged the installation, creating a loss of about N.Kr. 4,000,000. The tanker was the largest vessel which up to that time had berthed at the terminal. The damaged dolphin had been designed to withstand a pressure of 10.8 tons/metre, and the strength of the berthing construction was adequate for the safe berthing of a 100,000 tonner at an approach angle of 5 degrees and a maximum speed of 9 metres per minute corresponding to 0.3 knots. The vessel received no advance information about the data. Her approach angle was about 20 degrees, and the speed about 2 knots. In consequence, severe damage resulted, but the contributing factors are significant.

The pilot, who was a regular harbour pilot, had never before piloted such a large vessel. He knew nothing about the dimensions and strength of the berthing structure, and neither he nor the master received berthing instructions or other data from shore. Although tugs were available and in position, the pilot decided not to use them, and he misjudged the vessel's speed, turning ability and distances to the shore installations. No help was received from shore, and no co-operation was established between ship and shore.

In the subsequent settlement negotiations, the representatives of the terminal maintained that there are no rules, regulations or established practice in Japan which put a duty of active participation on the terminal operator or a duty on his part to give berthing instructions to vessels. They maintained that it was the duty of the pilot to ascertain the relevant conditions at the terminal to which he was proceeding and that the manoeuvring of the vessel was no concern of the shore side. The pilot was considered to be exclusively in the service of the vessel, and it was claimed that if

he or the master felt that shore information was needed, they should have asked for it.

The matter was disposed of through amicable settlement in 1968 by payment of 70 pct. of the established damage. The arguments which are advanced in this paper were made on behalf of the vessel, and resulted in a 30 pct. reduction which at that time was considered satisfactory. With recent developments in mind, the result would not be considered satisfactory for the vessel to-day.

A more recent case involved an Oslo tanker of 80,000 tons gross, 156,000 tons dw. which during berthing at a discharging installation in Japan in February 1971 caused damage to a dolphin to the extent of N.Kr. 2,500,000. I do not know what stresses the installation had been designed to withstand, as the vessel was given no information about it. But the angle of approach at the berthing was 20 degrees, and speed about 2 knots, which was excessive. The 63 year old pilot had no experience with the largest tankers. He did make use of tugs, but used them wrongly, and he miscalculated the speed and various distances to the installations. The pattern was the same as in the example mentioned above: No information received and no instructions given to the master — no data on the shock absorbing ability of the structure, nor data on applicable speed and angle. The pilot belonged to the Tokyo Pilot Association, and he had had no advance contact with the terminal operator. The claim has not yet been disposed of, but there is no doubt that shore side factors will be a major element in the vessel's defence.

The two examples demonstrate that the pilot is a key person. The shore side should be charged with a duty to ascertain that the pilot entrusted with the berthing of the large tanker has been given a detailed knowledge of all relevant features at the terminal, that he has previous experience from similar vessels in similar berthings, that he receives detailed instructions on how the berthing should be performed before he boards the vessel, and that the various tasks have been assigned and a co-operation has been established between the pilot, berthing master, tug boats and the tanker's master.

I have in another context referred to the Kristiansand tanker damaging a fender system in Singapore in 1970. The vessel was caught by the current and was set against the quay. The quay front fender had to be renewed, and the claim amounted to about N.Kr. 4,000,000.

The damaged terminal was situated in an area where vessels are

severely exposed to tidal currents. The tanker approached the quay in proper fashion, and was stopped in the water alongside at the proper distance in order to be pushed by tugs towards the quay. While lying still in the water, the bow was set towards the quay by a current of 2.5 knots, and damage was caused. The current was variable between 1 and 2.5 knots, depending on weather conditions. However, the current was never measured in connection with berthing of vessels, and the pilot had to make rough estimates. It is part of the story that the master had never been at the terminal before and was given no advance information. The matter has recently been disposed of through amicable settlement in which the vessel paid a smaller part of the claim.

VI. SOME SHIP SIDE PROBLEMS

Some of the features just mentioned make it natural to consider the vessel's predicament. Clearly, the master will at times be severely handicapped without shore side assistance. Just as the airplane pilot must be guided in landing by the airfield tower and in important respects merely execute ground orders received, the ship's master and his crew must also to quite some extent execute mechanically what others ask them to do.

If the vessel does not receive the necessary assistance, she should have the right to refuse to proceed.[7] That right makes good sense if a failure to assist occurs at a modern and highly developed terminal, as for instance the Esso Slagen Refinery. But such a right does not appear to be equally obvious at less developed terminals at which the conditions are more primitive. What would be the legal consequences if at such primitive terminals the master attempts berthing with resulting damage? Relevant examples are the ones from Japan described above. If the master attempts an unaided berthing, well aware of the hazards involved, should the vessel be held liable fully or in part, by reference to the standard legal doctrines of causation, negligence or contributory negligence? That is hard to say, but one thing is certain — the traditional considerations underlying the standard liability constructions do not match and satisfy the operation requirements of the large tankers nowadays.

Where the master docks his vessel without obtaining relevant

[7] *Michelet:* Om skade på skip under tidsbefraktning, AfS 1 (1954) p. 530—32 commenting on the British 'Sussex Oak' decision.

available data and without checking the pilot's qualifications and instructions given to him, the vessel will no doubt be held at least partly liable for resulting damage. Failure of such a nature will constitute negligence on the part of the vessel. When a berth has been nominated for loading or discharging, the master and his owners have quite some time available to obtain information and plan the berthing. The vessel is obliged to take the necessary initiative where the terminal operator fails to do so. I shall not attempt to apportion blame between ship and shore under the various circumstances. There is a scale from sole fault on the one party to sole fault on the other party, but where the ship has shown due diligence, she cannot be held liable.

VII. IS THERE A BASIS FOR LIABILITY WITHOUT FAULT?

I have so far assumed that liability ashore and on board must be based on negligence. Before proceeding with a discussion of liability for acts of servants employed in berthing, it may be pertinent to make some general observations on strict liability vs. liability based on negligence, taking into consideration elements of risk, the desire to avoid damage, and the availability of insurance covers. In Norwegian law strict liability of tort- feasors is recognized to some extent, and to a larger extent than in the law of other countries.

If it is accepted that a teamwork between ship and shore is necessary for the successful berthing of the largest tankers, the rules on liability must be based on two criteria: They should secure the co-operation necessary to avoid mishaps, and they should create a basis for having damage and loss covered by a favourable insurance, effected by the party which can obtain such insurance in the best way and with the least expense.

Considering that payment of damages to fixed objects represent a substantial portion of total payments made by the marine hull underwriters, the costs of such risk must clearly be reflected in the premium. But the elements affecting the determination of the premium for insurance in respect of damage to a ship or a tanker terminal would appear to be fairly identical whether the cover be a liability insurance or a property damage insurance. It is difficult to see that the availability of insurance, the extent of the cover or the premium for the risk should be materially affected by whether the vessel owner or the terminal owner insure the total risk. Without going into the problem in depth, I venture the conclusion that

from an insurance point of view it makes no decisive difference on which of the two parties liability for the total damage is placed.

But should the liability be strict, or based on negligence?

A strict liability as between ship and terminal is meaningless unless all liability for damage is placed squarely on the one or the other of the two. No purpose is being served by placing strict liability on each party for damage caused to the other. Only a desire to avoid double insurance of the same risk can justify a strict liability on one party for all damage caused through berthing. As will be known, most damages of this nature are covered by insurance.

Under the doctrine of negligence each of the two parties is liable for his own negligent acts and for those of his servants. That means double insurance, because each of the two parties runs the same exposure and has to insure against the same risks. But that is what always happens where a liability insurance and a property damage insurance cover the same risks. And it is a sound principle that a party is liable for his own negligent acts. Should a strict liability be introduced, it could adversely affect the frequency of mishaps occurring because the liable party might then have to pay for negligent acts of the other party's servants. He cannot, of course, instruct them or check their actions. Such a result may generally tend to diminish the required prudence and diligence. Thus, I submit that the desire to avoid accidents is a deciding factor against the introduction of a strict liability as between these parties, excepting, may be, for damage caused by defects and break-down in technical equipment on board or ashore.

In Norwegian law strict liability has been introduced for vessels causing damage to fixed objects. In two Supreme Court decisions, the 'Sokrates' ND 1953.320, and the 'Neptun' Rt. 1921.519, strict liability was imposed for quay damage caused by technical break-down in the reversing gear of a ship's main engine. In the subsequent 'Baltic' decision, Rt. 1969.1308, the Supreme Court went one step further and imposed strict liability for technical break-down in a different type of equipment on board resulting in damage to property other than a fixed object. The discharging gear broke down, killing a stevedore, and it was considered an obvious danger that such gear could break down and cause damage.[8]

In my view these decisions cannot be quoted in support of a

[8] The decision has been analysed by *Selvig* in TfR 1970 p. 225—253.

ruling of strict liability outside the field of technical break-downs. Should a break-down in nautical instruments on board occur at a critical time of berthing of a large vessel, strict liability for the vessel may be imposed by Norwegian courts in future. Correspondingly, strict liability on the part of the terminal operator may be envisaged should instruments for measuring wind, current or distances fail at a material time. There seems to be no reason why a technical break-down ashore should be treated differently from one on board.

However, outside of this field a mere reference to the high exposure to damage or to the dangerous nature of a berthing does not give an adequate ground for imposing strict liability. In most instances the mishap can be attributed to human errors, and negligence as basis for liability will suffice.

VIII. THE LIABILITY FOR OWN AND BORROWED SERVANTS

Time has come to consider which party shall be liable for the errors of the various persons participating in the berthing. That involves a discussion of whether the ship or the shore side shall be liable for participants not belonging to the vessel's regular crew, such as the pilot, the tugboat personnel, the berthing master or the instrument operators ashore.

Some of the oldest and most durable maritime axioms have been that the pilot — and the tugboats — are in the service of the vessel; that the master has the ultimate command on board and may follow or disregard the advice of the pilot at his own discretion; that the master has the ultimate responsibility for the safety of the vessel; and that he is in charge of the vessel's navigation. These axioms have been considered a self-serving justification for placing on the vessel the liability for errors by pilots and tugs etc. They are inadequate and somewhat unreal in our modern times.

As already mentioned, the master will frequently have no basis for evaluating the quality of the data or information he receives from the pilot or from shore. Nor is he qualified or equipped to put his judgment above the routines and procedures prescribed for the pilot, tugs, his vessel and himself by the terminal operator. For that reason the dogma no longer offers a satisfactory explanation for why the vessel should be liable when something goes wrong.

An overriding consideration should be to determine where the

liability ought to be placed in order to minimize the possibility of mishaps occurring in berthing. In my view, this should result in the terminal operator being liable for errors made by the harbour pilot. The reason is that the terminal operator has the best possibilities of checking that the designated pilot has the necessary qualifications, that he has adequate experience with large vessels at the terminal, that he has full knowledge of all relevant data in respect of the construction and the shock absorbing capacity of the installation, as well as knowledge about the prevailing winds and currents, the tugs and their capacity, the personnel ashore and their points of view. The terminal operator can make sure that the pilot has been properly briefed for each pilotage job to be performed, and that he is familiar with the general routines and procedures and with what has been arranged specifically for a particular ship. In other words: The major part of the functions to be performed by the pilot and tugs are controlled and influenced from ashore and cannot be influenced by the master on board. No master would dare to disregard the procedure prescribed by the Esso Slagen Refinery or the orders given by the pilot in complying with that procedure. This being so, the purpose of preventing mishaps is best being served by the shore installation assuming liability for negligent acts by the pilot on board.

That is not the position in Norwegian law. In the first place, Section 233 of the Maritime Code puts the liability on the vessel owner. Secondly, the courts of Norway as well as of many other countries have decreed that the pilot is the servant of the vessel, and that the vessel is liable towards third parties for his nautical errors. That view has been particularly clearly stated by the Norwegian Supreme Court in the 'Prince Charles', Rt. 1969.622. However, some decisions in other countries have put such liability on shore based parties — see for instance the American decision the 'Clearwater Park' 1951 AMC 851.

As regards the liability for tugs, the standard doctrine is that if the command of the operation is on board the vessel under tow, she will be liable for negligent acts of the tug.[9] But that doctrine relates to situations quite different from the one confronting the large tanker using tugs for berthing. Those tugs can best be instructed by the berthing master ashore who is in the best position to consider all relevant data. As in the case of the pilot, it fol-

[9] *Brækhus:* Rederens Husbondsansvar, Handelshogskolan i Göteborgs skriftserie 1953:2 p. 27.

lows that the terminal operator should be liable for errors committed.

The Norwegian Supreme Court in various decisions[10] dealing with the state liability for pilots and lighthouses etc. has held that the duty of the State is limited to making competent personnel and proper equipment available and that the State is not liable for their improper functioning. The individual failure is the vessel's risk inasmuch as personnel as well as navigational aids are working for the benefit of the vessel.

Such a doctrine seems to me untenable as between the ship and shore in berthing matters. The reason has repeatedly been stated above. In other fields of life the real employer is liable for his servants — examples are the airport operator for control tower personnel, the municipality for traffic police or the railroad company for traffic personnel.

In conclusion: Liability for the persons participating in berthing should be placed with the party having the power to instruct, direct and control them.

IX. WHO ASHORE SHOULD BE LIABLE

A few words should be said about which party ashore should be liable for damage caused to the vessel or to others.

Normally, the vessel owner has a contractual relationship with the charterer only, and not with other parties ashore involved in the berthing. In consequece, liability for other parties involved must be based on tort. The raison d'être of such liability can easily be found. Anybody making structures, installations or equipment available for public use, or assuming certain functions, must have a duty to act prudently. The State's liability for public servants is based on such a consideration.

It is not necessary here to shift liability between all parties involved, such as the harbour authority, the terminal owner, the operator or others. Suffice it to say that in any event the operator, who is the one having the full use of the terminal, should be liable to the vessel in instances where it is felt that the shore side should be liable. I leave open the question of whether or not other parties should be held liable as well, but make an exception for the charterer.

Where the charterer is not the terminal operator, the question

[10] The 'Prince Charles' ND 1963.34 and the 'Tirranna' ND 1971.82.

arises whether the vessel may claim for damage under the 'safe berth' doctrine. More precisely: should the traditional charterer's liability for 'safe berth' be construed differently when the claim is in respect of damage suffered by the ship in berthing?

I submit that it should. The standard doctrine which puts on the charterer a modest duty of supplying information and rendering assistance to the vessel and in consequence puts only a modest liability on him, is insufficient in this field. A charterer knowing that the vessel which he is employing must approach the discharging berth with a speed not exceeding 0.2 knots and must observe special precautions, cannot be allowed to rely on the view that it is up to the master to take his ship alongside, and that he and the pilot should deal with the people ashore as best they can.

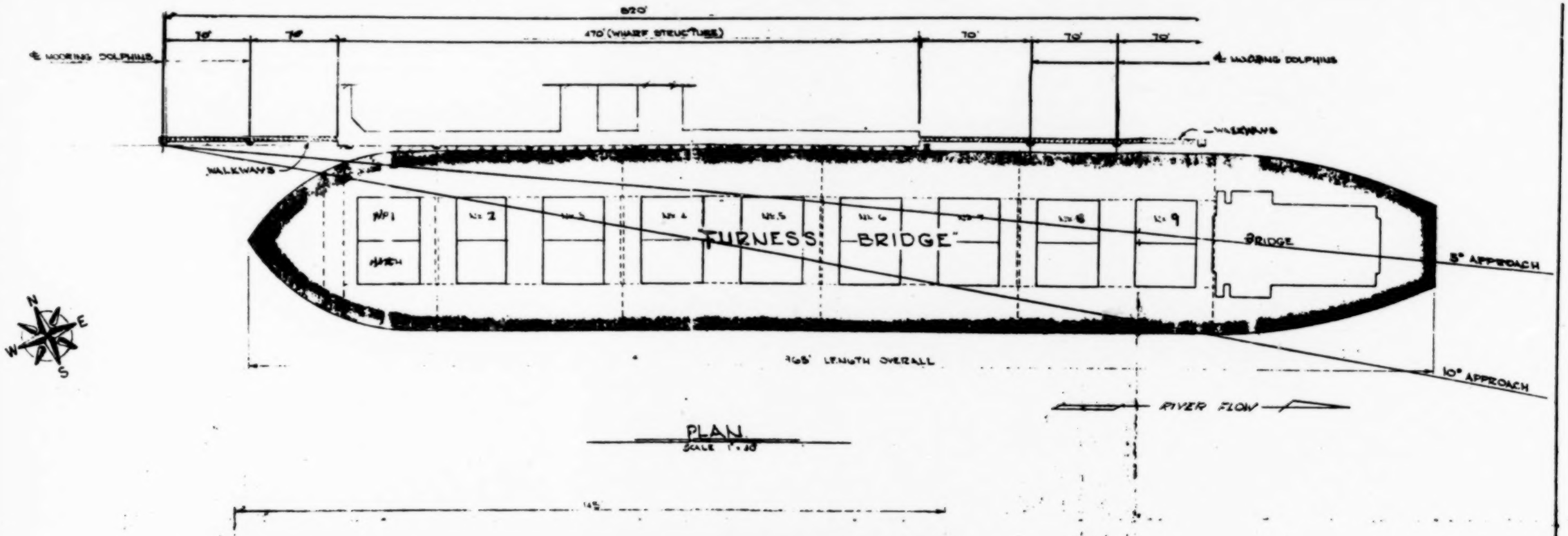
Perhaps the charterer ought to be charged with an express or implied warranty for providing all necessary assistance. Basically this is a question of negotiation between the contracting parties. The problem cannot be solved by legal construction of the standard safe berth clauses which are being used. An obligation on the part of the charterer to render active assistance and co-operation cannot be injected into these clauses which were designed for the transportation models of older days. Perhaps a tailormade liability clause should be introduced into the charter parties for the large tankers. I propose for consideration a clause along the following lines:

'Berthing Clause

Charterers to make available to the vessel all data, information and instructions necessary for the normal and safe approach and berthing of the vessel at any berth to which she is directed to proceed. Such communications shall include, but not be limited to, data on the shock absorbing capacity of the berth structure and its fendering system, the maximum approach speed and angle for the vessel under the prevailing circumstances and detailed information on the force and direction of wind and current at the berth, the availability and suggested use of tugs, the provision of a specially trained pilot and a berthing master with competence to guide and assist the vessel.

Charterers to indemnify the owners for all damage and loss resulting from failure to comply with the obligations provided herein.'

If some readers feel that such a clause deviates too radically from the pattern of the traditional safe berth clauses they should remember that the large tankers frequently are invited to call at terminals built for smaller vessels and which require the highest degree of manoeuvring precision. The charterer who extends such an invitation to the vessel is the natural party to carry the risk for damage and pay resulting loss.



PLAN
SCALE 1" = 40'

TYPICAL SECTION
SCALE 1" = 8'

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